88-1902

No.____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GARY MAROSITZ, RICHARD GROSS, JAMES BEGIES, GEORGE MAYER, ALEXANDER SZOKE, RUEL OSWALD, ROBERT VOGEL, JEFFREY FENSTERMACHER, WILFRED BRUMBAUGH, NORMAN HOOVER, ROBERT BURK, RICHARD YELLES, WAINWRIGHT BEAL, RONALD SILFIES, BARRY SILFIES, ROBERT CSENCITZ
and
INDEPENDENT WORKERS OF NORTH AMERICA,
Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, CHARLES JONES, DONALD WHAN and HENRY HARDEN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Should not the Court grant the writ and decide this case* because the decision of the court below conflicts with the Seventh Circuit's interpretation and construction of the same union constitution and merger agreement?

2. Should not the decision of the court below be reviewed and reversed because, in reversing the trial court, it creates an improper restraint on members of local unions who unanimously choose to change their locals' affiliation, and thus conflicts with the fundamental federal labor policy of consensual unionism?

3. Should not the Court grant the writ and decide this case where, unlike other related actions, the decision rendered by the district court was reached on a full record after a trial on the merits?

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* The following were the parties to the proceeding in the court below. As appellees/cross appellants: Local Lodges D504, D17, D54, D376, D547 and D554 of the Cement, Lime, Gypsum and Allied Workers, Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO; Gary Marositz, Richard Gross, James Begies, George Mayer, Alexander Szoke, Ruel Oswald, Robert Vogel, Jeffrey Fenstermacher, Wilfred Brumbaugh, Norman Hoover, Robert Burk, Richard Yelles, Wainwright Beal, Ronald Silfies, Barry Silfies, Robert Csencitz and the Independent Workers of North America; and as appellants/cross appellees: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO and Charles Jones, Donald Whan and Henry Harden.

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No.____

IN THE

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October Term, 1988

LOCAL LODGE D504, D17, D54, D376, D547 and D554 OF THE CEMENT, LIME, GYPSUM AND ALLIED WORKERS, DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO; GARY MAROSITZ, RICHARD GROSS, JAMES BEGIES, GEORGE MAYER, ALEXANDER SZOKE, RUEL OSWALD, ROBERT VOGEL, JEFFREY FENSTERMACHER, WILFRED BRUMBAUGH, NORMAN HOOVER, ROBERT BURK, RICHARD YELLES, WAINWRIGHT BEAL, RONALD SILFIES, BARRY SILFIES, ROBERT CSENCITZ, et al.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Independent Workers of North America and Gary Marositz, Richard Gross, James Begies, George Mayer, Alexander Szoke, Ruel Oswald, Robert Vogel, Jeffrey Fenstermacher, Wilfred Brumbaugh, Norman Hoover, Robert Burk, Richard Yelles, Wainwright Beal, Ronald Silfies, Barry Silfies, Robert Csencitz, in their

individual capacities, petition for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Third Circuit, entered on March 1, 1989.

OPINIONS BELOW

The Bench Opinion of the United States District Court for the Eastern District of Pennsylvania has not been reported (A19-32).[1] The Opinion of the United States Court of Appeals for the Third Circuit, which reversed in part and affirmed in part the decision of the District Court, is officially reported at 866 F.2d 641 (A3-18). The Order of the Court of Appeals denying rehearing and rehearing *in banc* (A1-2) is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered February 1, 1989. The Order denying rehearing and rehearing *in banc* was entered on March 1, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §2350(a).

STATUTORY PROVISIONS INVOLVED

Section 7 of the Labor Management Relations Act of 1947, 29 U.S.C. §157 (herein "LMRA") provides:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right

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1. References herein to "A" pages are to the Appendix to this Petition.

> may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

Section 8(b) (1) of the LMRA, 29 U.S.C. §158 provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of grievances.

Section 501(a) of the LMRDA, 29 U.S.C. § 501, provides:

> §501. Fiduciary responsibility of officers of labor organizations
>
> (a) Duties of officers; exculpatory provisions and resolutions void

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever

capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

STATEMENT OF THE CASE

The instant case is yet another in a series of nationwide individual actions involving related issues and claims that continue to occupy the attention of the federal judiciary. This mass of litigation has resulted in the courts of appeals reaching differing interpretations of the same union constitution and merger contracts at issue.

The issues raised by this case and related litigation surround the rights of local union members to freely resign and affiliate *en masse,* as a local union entity, with a different international or parent labor organization. More precisely, the question presented is whether the members of local unions can effectively disaffiliate their local from a recently-merged-with international union and then become affiliated, as a local union entity, with a new international without suffering the severe forfeiture penalties of (1) being compelled to continue paying union dues to the castoff, former international and (2) being compelled to forfeit and transfer to the old international the entirety of the local unions' assets and treasuries. The instant case is particularly appropriate for review by this Court because, unlike other appellate decisions in this litigation, the instant case was decided by the district court after a full trial on the merits and, thus, upon a full record.

This case, like its brethren, arises out of a merger between the United Cement, Lime, Gypsum and Allied

Workers International Union (herein "Cement Workers") and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (herein "IBB"). This merger occurred, pursuant to a merger agreement, effective April 1, 1984 (A6). The local unions comprising the Cement Workers at the time of the merger with the IBB – including the local union defendants in the instant case – were financially solvent. These Cement Workers locals brought to the merger their local union assets and treasuries accrued from collected members' dues. Under the merger agreement, the former Cement Workers locals were designated as the Cement Division of the IBB and retained their Cement Workers local union numerical designation with the addition of a "D" prefix which identified the local as belonging to the Cement Division of the IBB.

The merger agreement controlled the merger between the Cement Workers and the IBB and further provided that where the merger agreement and the IBB constitution – the surviving constitution governing the merged organization – conflicted, the merger agreement would prevail as the controlling authority (*see* A9) until the IBB 1991 Consolidated Convention.[2] Significantly, the merger agreement reached by the Cement Workers and the IBB addressed concerns, raised by Cement Workers members and officers, that they might lose their local union treasuries after the merger with the IBB by providing that "[e]ach Local Lodge will retain its Local Union Treasury."[3] This clause became known as the "retain clause" (A9-10).

Following the merger, the romance between the Cement Workers and the IBB soured. In particular, at the August, 1986 IBB Convention, the Cement Division

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2. The IBB conducts a Consolidated Convention every five years. The previous Consolidated Convention took place in 1986.

3. The merged locals were referred to as "local lodges" while the prior-existing Cement Workers local unions were referred to as "local unions".

membership became highly disgruntled by what was viewed to be manifold, serious violations of the terms of the merger agreement (A6). Although the merger agreement provided that the Cement Division would have it's own International Vice President at-large, at the 1986 Convention the Cement Workers were not permitted to exclusively elect a Cement Division International Vice President. Rather, the entire body of delegates – including both the Cement Division and regular IBB delegates – were permitted to vote for this seat. As a result, Richard Northrip, who was the former Cement Workers President, was not elected to a Vice Presidency in the new IBB regime (A6). Further, a number of IBB International Representatives, who were former Cement Worker officials aligned with Mr. Northrip, were summarily terminated by the new leaders of the new regime.

The dissatisfaction flowing from the treatment of the Cement Division and its leadership at the 1986 Convention provided the impetus thereafter for the formation of a new labor organization, the Independent Workers of North America (herein "IWNA"), by Mr. Northrip and his supporters (A6). Local unions nationwide, including the local union defendants in the case at bar formerly known as Local Lodges D504, D17, D54, D376, D547 and D554 (herein the "Locals"), participated in disaffiliation proceedings designed both individually and collectively, to cancel their membership and affiliation with the IBB.[4] These persons then affiliated with the IWNA, after the Locals' treasuries and assets were transferred to the local union affiliate of the IWNA – still designated by the same number but without the "D" prefix – to continue to be held in trust, as before, for the benefit of the Locals' membership. Pursuant to the disaffiliation vote held by each Local, *all* of the rank

4. Ultimately, in each case an election was conducted by the National Labor Relations Board (herein "NLRB") and the IWNA was certified as the bargaining representative of the members.

and file members of each Local resigned their membership in the IBB (A7) and, consistent with this direction and the disaffiliations, the Locals discontinued the payment to the IBB of union members' dues payments.

Several months after the disaffiliations, the IBB revoked the Locals' charters for lack of the minimum of ten members required under the IBB constitution (A7).[5] Upon the Locals' refusal to forfeit to the IBB all books, records, funds and assets – including the Locals' treasuries – the IBB commenced the instant litigation by filing six individual actions against the Locals and the officers of the Locals who were in office at the time of the disaffiliations. The complaints sought the entirety of the Locals' treasuries and assets and further alleged a tortious interference with contract claims against the IWNA.

The district court consolidated these actions and, after a full trial on the merits, held that under the "retain clause" of the merger agreement, the Locals were entitled to retain their local union treasuries (A26). The district court found that the retainer clause of the merger agreement conflicted with the "surrender" forfeiture provision of the IBB constitution. But, in view of (1) language in the merger agreement's preamble which provided that the merger agreement – even where it conflicted with the IBB constitution – was binding until the 1991 Consolidated Convention and (2) the negotiated exclusion of local union assets and property from the "transfer" clause of the merger agreement, the trial court held that the Locals were entitled to keep their treasuries pursuant to the "retain clause" (A26).[6] The

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5. The IBB constitution contained a clause directing the forfeiture of a local's assets and property if membership in the local fell below ten.

6. As noted, the "forfeiture" or "surrender" clause, in the nomenclature of the court below, appears in the IBB constitution and requires the surrendering of local union books, records, assets, *etc.* upon revocation of a local union charter.

district court, in so ruling, noted that the transfer clause of the merger agreement was specifically negotiated by the Cement Workers to exclude local union treasuries from the otherwise wholesale transfer of former Cement Worker assets to the IBB (A26). The Locals, however, were found liable to the IBB for both the payment of per capita taxes during the period between their disaffiliation and certification by the NLRB, and the remainder of their assets and property (A27). The result of the district court's holding was that the Local was able to retain its treasury – the same treasury it brought to the IBB when it merged into it in 1984 – upon its disaffiliation from the IBB.

The IBB appealed the district court's award of the treasuries to the Locals and the Locals cross-appealed the award of per capita taxes to the IBB. On appeal, the Court of Appeals for the Third Circuit reversed the district court's ruling on the Locals' treasuries, and held that the "retainer" clause and other contract language did not entitle the Locals to keep their treasuries (A5). The appellate court, however, affirmed the trial court's award of per capita taxes to the IBB (A5). In so holding, the court below ruled that the merger agreement and the IBB constitution did not conflict, but, rather, could be construed together and in a reconciled fashion on the issue of the Locals' right to retain their treasuries (A13). The court also found, contrary to a related decision of the Court of Appeals for the Seventh Circuit, that the IBB Constitution "prohibits disaffiliation" (A10 n. 8). The impact of the decision below is that despite the trial court's award of the treasuries to the Locals, the members cannot escape the complete forfeiture of their Locals' treasury and assets and must continue to pay union dues to the IBB – a formerly affiliated international from which the members acted expressly to sever all relations and obligations as of the dates of their disaffiliation.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for a number of reasons. First, the instant case deserves a writ of *certiorari* because the court below construed the controlling documents to unambiguously prohibit petitioners' disaffiliation from the IBB, whereas the court of appeals for the Seventh Circuit has construed the identical contracts to be ambiguous on the question of whether disaffiliation is prohibited. Consistent judicial resolution of important issues presented by the instant case — issues which control fundamental rights of union members — requires an authoritative ruling by this Court. Absent such a ruling, the federal appellate and trial courts will continue to be left without guidance in ruling on a large number of still-pending or recently filed individual actions between the parties involving identical or closely related issues.[7]

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7. *See, e.g., International Bhd. of Boilermakers v. Local Lodge 714,* 663 F.Supp. 1071 (N.D. Ill., 1987), *vacated and rem.,* 845 F.2d 687 (7th Cir. 1988) on remand, 696 F.Supp. 691 (N.D. Ill., 1988); *International Bhd. of Boilermakers v. Local Lodge D30,* No. NA 88-1-C (N.D. Ind., Nov. 30, 1988); *International Bhd. of Boilermakers v. Local Lodge D461,* 663 F.Supp. 1031 (M.D. Ga. 1987) and a handful of other reported decisions. Moreover, there are numerous additional actions pending in the district courts between the Boilermakers International and disaffiliated former local lodges. *See, e.g., International Bhd. of Boilermakers v. Local Lodge D392,* No. 89-0910 (S.D. Fla., filed May 2, 1989); *International Bhd. of Boilermakers v. Godfrey,* No. 87-C-2010-S (N.D. Ala., filed Nov. 13, 1987) (six consolidated actions), *International Bhd. of Boilermakers v. Local Lodge D354,* No. EV-87-129-C (S.D. Ind., filed Aug. 10, 1987; *International Bhd. of Boilermakers v. Local Lodge D129,* No. 88-CV-0126 (N.D.N.Y., filed Feb. 4, 1988); *International Bhd. of Boilermakers v. Bivens,* No. 88-42-3-MAC (M.D. Ga., filed Feb. 23, 1988) *International Bhd. of Boilermakers v. Miller,* No. 1-87-442 (E.D. Tenn., filed Dec. 14, 1987); *International Bhd. of Boilermakers v. Smith,* No. 1-87-CV-2511CAM (N.D. Ga., filed Nov. 19, 1987); *International Bhd. of Boilermakers v. Local Lodge D52,* No. CV-88-1136-WJR (JRx) (C.D. Cal., filed Mar. 2, 1988) (three additional unconsolidated companion cases against three other local lodges).

Second, this case should be reviewed because the decision below contravenes federal labor policy by creating an improper restraint on local union members who choose to change affiliation. It enforces a total, contractual forfeiture of all the treasuries and all assets and property held in trust by local unions for the benefit of their members after the members of the locals act to change their international affiliation but remain intact as a continuing local union entity. In this fashion, the decision below infringes hallmark principles of democratic unionism which underly the Labor Management Relations Act of 1947, 29 U.S.C. §151, *et seq.* (herein "LMRA"), and the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §401 *et seq.* (herein "LMRDA"). The complete forfeiture of the entire treasuries and all of the assets and property of local unions and their constituents improperly penalizes and impairs union members' rights to freely resign. Such a result also chills the exercise of union members' democratic, constitutional and statutorily guaranteed rights of free choice and association in selecting a bargaining agent under the LMRA.

Furthermore, the decision below is inconsistent with both broad federal labor policy and the corpus of decisional law rendered by the NLRB, because the court below has compelled union members who resign from an international to continue paying union dues despite their resignations and reaffiliation. The decision below threatens, undermines and chills the fundamental rights of democratic unionism and free association which are guaranteed to union members under the federal labor acts and form the foundation of organized labor. Finally, the instant case deserves a writ of *certiorari* because unlike the decision of the Eleventh Circuit in *International Bhd. of Boilermakers v. Local Lodge D111,* 858 F.2d 1559 (11th Cir. 1988), *cert. denied,* 57 U.S.L.W. 3722 (U.S. May 2, 1989) (No. 88-1490) (herein *"D111"*), which merely affirmed a summary

judgment, the instant case was adjudicated on the merits and upon a full record. This important and significant distinction warrants review of the instant case despite the Court's denial of the petition before it in *D111,* particularly where, as here, the court below reversed the trial court's determination on the merits that the Locals were entitled to keep their treasuries.

In sum, acceptance of the decision below would have various severely adverse consequences. It would, in the first instance, leave unsettled the differing interpretations of the contracts at issue. Moreover, it would leave standing a decision which squarely contravenes hallmark federal labor policies of free and democratic unionism which underly the LMRA and LMRDA. Third, acceptance of the decision below would fail to address the gross inequity and the evisceration of free choice rights resulting, after a full trial on the merits and the clear showing of unanimous desire by the members to depart from the IBB, from the imposition on the Locals' members of an obligation to continue paying dues to an organization which had been unequivocally cast off by the membership. Thus, this case presents issues of critical importance to the labor movement generally and, with respect to the petitioners, issues upon which rest their entire, collective faith and belief in the integrity of the principles of democratic and consensual unionism. The hardworking, rank and file members represented by the individual petitioners respectfully urge this Court to exercise its discretion to review the central and important questions presented by the issues in the case at bar.

I. THE COURT SHOULD GRANT THE WRIT AND DECIDE THIS CASE BECAUSE THE DECISION OF THE COURT BELOW CONFLICTS WITH THE SEVENTH CIRCUIT'S INTERPRETATION AND CONSTRUCTION OF THE SAME UNION CONSTITUTION AND MERGER AGREEMENT.

The decision of the court below completely divests the members of six local unions of the entirety of their local union treasuries. In reaching this result, the court below expressly found that the IBB Constitution "prohibits disaffiliation" (A10 n. 8). This finding squarely conflicts with the finding of the Court of Appeals for the Seventh Circuit in the *International Bhd. of Boilermakers v. Local Lodge 714,* 845 F.2d 687 (7th Cir. 1988). There, the Seventh Circuit found that "[t]he international's constitution is ambiguous on the right to disaffiliate." *Id.* at 692. Thus, there is a conflict between the interpretations of these two courts with respect to the controlling documents involved in both the decision below and in numerous pending individual actions nationwide. More compelling, however, are the serious inequities and injustice resulting from the *status quo* should the decision below be left undisturbed. Allowing the IBB to retain the whole of the Locals' economic substance, under the circumstances presented by the instant record, simply works an unjust enrichment to the IBB and unfairly penalizes the Locals and their constituencies.

II. THE DECISION BELOW MUST BE REVIEWED AND REVERSED BECAUSE IT CREATES AN IMPROPER RESTRAINT ON LOCAL UNION MEMBERS WHO CHOOSE TO CHANGE AFFILIATION, AND THUS CONFLICTS WITH THE FUNDAMENTAL FEDERAL LABOR POLICY OF CONSENSUALISM.

The decision of the court below contravenes and offends the basic concept of free choice guaranteed to

individuals under the federal labor acts and the fundamental Constitutional guarantees of free association.

A. Democratic Unionism Principles, the Hallmark of Organized Labor, Have Been Jeopardized.

The LMRA's Section 7 policy of consensual unionism is contravened by the decision below. That key LMRA policy is embodied in provisions which confer upon employees the right to self organization and the right to freely choose a collective bargaining representative without influence or restraint by labor unions or any other person. *See Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,* 690 F.2d 489 (5th Cir. 1982), *reh'g. denied,* 696 F.2d 996 (5th Cir.), *cert. denied,* 464 U.S. 335 (1983); *accord, NLRB v. Red Arrow Freight Lines,* 180 F.2d 585 (5th Cir.), *cert. denied,* 340 U.S. 823 (1950).

Section 8(b)(1)(a) of the LMRA implements the general Section 7 rights to self-organize and freely choose a bargaining representative by making it an unlawful unfair labor practice for a union to restrain and coerce employees in the exercise of their Section 7 rights.

Those rights of free choice must be equally protected in the present setting, where union members have exercised their right to resign. In *Pattern Makers League v. NLRB* 473 U.S. 95 (1985), the Court described the right of a union member to resign and quoted from a line of earlier decisions which affirmed the doctrine that when a union constitution does not contain affirmative restrictions on resignations, the "law which normally is reflected in our free institutions" is applicable and members are free to leave at any time. *Id.,* 473 U.S. at 112, citing *NLRB v. Granite State Joint Board, Textile Workers Union Local 1029,* 409 U.S. 213 (1972) (herein *"Granite State"*), and *Booster Lodge No. 405, Int'l. Ass'n. of Machinists v. NLRB,* 412 U.S. 84 (1973).

The holding below renders union members' statutorily protected right to resign contingent upon the dual penalties of both (l) the forfeiture of all treasury monies accrued by the members' local from their voluntary dues payments, and (2) the continued obligation to pay further dues to their former, unwanted international. In this fashion, the decision below creates an improper restraint on members of local unions who choose to change affiliation, and thus conflicts with the fundamental federal labor policy of consensual unionism.

B. The Decision Below, by Granting the IBB the Entirety of the Locals' Treasuries, Conflicts with Policies Expressed in the LMRDA.

The policies expressed in the LMRDA are frustrated by the decision below. In Congress' declaration of findings on the purpose and policy of the LMRDA, Congress declared it to be the responsibility of the federal Government to, among other things, protect employees' free choice rights in selecting a bargaining representative and otherwise engaging in concerted activities. 29 U.S.C. §401(a). Section 501(a) of the LMRDA specifically addresses the responsibility of local union officers entrusted with the assets and operations of locals and creates liability for the usage or conversion of union funds. In the case at bar, no claim has been made that there has been any conversion or usage of funds like that contemplated by Section 501. On the contrary, the evidence in the record shows in graphic detail that *all* the members of the six (6) Locals signed cards revoking their IBB dues authorizations in favor of their new IWNA locals (A7). The local union officers acted only in accordance with the memberships' individual and freely given decision to disaffiliate from the IBB and consequent direction to the officers to transfer and hold in trust for them the treasuries and other property of the Locals.

Significantly, not a single member of any of the Locals invoked the remedies provided for in Section 501 to seek a reversal of their officers' actions. The asset transfer was not clandestine but was openly deliberated and conducted. Following the transfers, the Locals remained in existence, represented the same employees, were led by the same officers and continued their identities as collective bargaining agents for rank and file.

Indeed under Section 501, the members of the local unions are the proper persons to keep the treasuries of the Locals. By virtue of their continuing identity as a local union entity, the locals and their members fall within the ambit of Section 501 and its directive that local union "money and property [be held] solely for the benefit of the organization and its members." In short, the mandate of and policies underlying Section 501 of the LMRDA support the Locals' retention of their treasuries and require review and reversal of the decision below.

C. Equitable Concepts of Beneficial Ownership Require the Locals' Retention of Their Treasuries.

The membership of a local union is the beneficial owner of the Locals' assets and property. Even the forfeiture provision of the IBB constitution recognized this, for it provides that "[t]he funds and property of a subordinate body are trust funds for the benefit of its members. . ."

This principle of trust law was expressly adopted by the parties when the Cement Workers and the IBB met to negotiate their merger. The "transfer clause" of the merger agreement (*see* A10) excludes from the funds and properties transferred to the IBB as part of the merger the transfer of *local union* funds and properties. Only the funds and properties held by the Cement

Workers International Union and Cement Worker District Councils – regional, umbrella organizational entities comprised of a group of locals – were expressly transferred to the IBB. The Locals' funds and properties were not so transferred. Instead, the parties negotiated into the merger agreement the "retain" clause, which provides that "each Local Lodge will retain its Local Union treasury" (*see* A9-10). Thus, the parties included in their agreement language which incorporated the basic and overriding concept that the Locals' treasuries were held in trust for the immediate and exclusive benefit of the Locals' members, and were not subject to transfer – and consequent dilution or forfeiture – to the IBB.

This protection of the Locals' assets was particularly appropriate in the present context – where the Cement Workers were dissolving their own international organization through merger into a foreign labor union. The court below erred by failing to properly construe the merger agreement within the context in which it was negotiated by reference to the apparent intentions of the parties, and in particular with respect to the ownership and retention of the Locals' treasuries as buttressed by the principle of beneficial ownership.

In the case at bar, the members of the Locals unequivocally expressed their desire to end their short-lived relationship with the IBB by executing resolutions and petitions in favor of disaffiliation, voting for disaffiliation, executing dues checkoff revocations and authorizations and choosing the IWNA as their bargaining agent. Under these circumstances, "[n]o clearer expression of resignation" from the IBB is needed to establish the severing of this relationship. *International Bhd. of Boilermakers v. Local Lodge 714*, 696 F.Supp. at 393.

The Locals treasuries at issue consist of funds accrued from members' dues payments deducted from members' wages. These funds are entrusted to the Locals' officers for the members' benefit in the conduct

of necessary representational activities. Any forfeiture of these funds by the Locals' members contravenes the parties' intent in negotiating the "retain" clause of the merger agreement, and, moreover, the expectations of the Locals' members built upon years of paying dues into the local union treasury.

Further, the loss of the Locals' treasuries constitutes an improper penalty on the members' individual rights to resign and this stands in contravention of decisions of both this Court and the NLRB. It has been consistently held by the NLRB that union constitutions which restrict resignation rights violate the LMRA, and the NLRB has expunged such constitutional provisions as a remedy. *See, e.g., Machinists Local 1414,* 270 N.L.R.B. 1330 (1984); *Machinists Local 2045,* 268 N.L.R.B. 635 (1984). Further, this Court held in *Scofield v. NLRB,* 394 U.S. 423 (1969) that in order for union sanctions to be lawful, a union member must be free to escape the sanctions imposed by resigning from the union. *Accord Granite State, supra.* (no penalization after resignation); *Booster Lodge No. 405, Int'l. Ass'n. of Machinists v. NLRB,* 412 U.S. 84 (1973) (same). Where, as here, local union treasuries have been forfeited, the members' resignation rights have thus been vitiated and improperly impaired.

D. The Continued Dues Obligation Imposed by the Court Below Conflicts With Fundamental Federal Labor Policies.

Under the LMRA, the NLRB has held that the payment of union dues is a necessary requirement in order to maintain union membership. *U.S. Postal Service,* 279 N.L.R.B. 40 (1986). Here, the IBB constitution requires locals to pay a portion of the dues received from members to the international in the form of per capita taxes. Where, however, a member no longer pays dues, the failure to pay dues results in the discontinuance of

membership and, therefore, there is no obligation of the local to in turn pay per capita taxes. *See UFCW Local 425,* 282 N.L.R.B. No. 175 (1987). Indeed, the IBB constitution provides for the automatic suspension from membership of any member whose dues are in arrears for two calendar months. Significantly, in the case at bar, the IBB disbanded the six Locals under the ten-member provision of the IBB constitution precisely because the IBB considered the members' failure to pay dues for a two month period to have resulted in the severance of all of the Locals' members and, consequently, the disbanding of the Locals (A7).

After acknowledging the dissolution of the Locals, the court below erred in awarding the continued payment of per capita taxes to the IBB. Because the Locals were disbanded as a matter of law for lack of the needed active membership under the IBB constitution, there can be no finding of any continuing dues obligation of the members to the IBB. Imposing this obligation upon the members of the dissolved Locals is neither supported by logic nor law. Nor is there any factual support in the instant record for any transfer of the per capita obligations of the dissolved locals *qua* local unions affiliated with the IWNA. Members who deliberately and voluntarily have voted to resign membership with the IBB should not be held captive and compelled to continue paying dues to the rejected organization. *See Pattern Makers League, Scofield, Granite State* and *Booster Lodge No. 405, supra.* Indeed, under its constitution, the spurned international has the option of either attempting to enforce a dues checkoff and payment provision in a collective bargaining agreement covering the delinquent members or seeking to collect the dues upon reinstatement of the delinquent, suspended members. Other than these procedures, there is no lawful basis for holding members liable for further payment of dues after resignation from a union.

In short, the court below erred in equating the continued NLRB certification of the IBB beyond the actual dates of disaffiliation – until the often slow-moving official NLRB processes eventually wended their way and "certified" the Locals' departure from the IBB and concommitant affiliation with the IWNA – as the lynchpin for determining per capita tax liability (*see* A16-17). Focusing only on the after-the-fact official actions taken by the NLRB as did the court below, ignores the entire question of individual autonomy and the effective and responsive exercise of free choice in choosing a bargaining agent. The record clearly shows that the members of the Locals wanted *nothing* more to do with the IBB, let alone the continued payment of dues to the IBB. The judicial enforcement of such continued payment by the court below improperly and erroneously infringes upon the established principle that resignation from a labor organization may be accomplished without penalty.

III. THE COURT SHOULD GRANT THE WRIT AND DECIDE THIS CASE BECAUSE, UNLIKE OTHER RELATED ACTIONS, THE DECISION BELOW WAS REACHED ON A FULL RECORD AFTER A TRIAL ON THE MERITS.

The case at bar bears an important and significant difference from related appellate decisions which present similar facts and issues. Here, the decision below was reached on the basis of a full record after a trial of all issues on the merits. The important issues presented by this case can therefore be properly resolved before a full, factual background.

Thus, unlike *International Bhd. of Boilermakers v. Local Lodge D111,* 858 F.2d 1559 (11th Cir. 1988), *cert. denied,* 57 U.S.L.W. 3722 (U.S. May 2, 1989) (No. 88-1490), which was an action decided on summary judgment, the instant case stands on a full record and is

particularly appropriate for this Court's review. Moreover, the issues involved in the instant case are different than those raised in the *D111* litigation. In the instant case, the IBB has claimed that the Locals became disbanded upon disaffiliation, whereas in the *D111* action the IBB took the position that there had been no disbandment. *Compare* (A7) *with Local Lodge D111,* 858 F.2d at 1562-63. Hence, the issues are not congruent between these actions, and, in any event, the presence of a complete record in the instant action warrants its independent review by this Court.

CONCLUSION

For the reasons stated in this petition, the Petitioners respectfully urge the Court to grant a Writ of Certiorari to review the decision and judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 88-1379

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, et al., CHARLES W. JONES, DONALD WHAN and HENRY HARDEN

Appellants,

v.

LOCAL LODGE D504, et al. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO

No. 88-1395

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, et al.

v.

LOCAL LODGE D504, et al. Local Lodge D17, Gary Marositz, Richard Gross, James Begies, Local Lodge D54 George Mayer, Alexander Szoke, Local Lodge D376 Ruel Oswald, Robert Vogel, Jeffrey Fenstenmachaer, Local Lodge D504, Wilfred Brumbaugh, Norman Hoover, Robert Burk, Local Lodge D547, Richard Yelles, Wainwright Beal, Ronald Silfies, Local Lodge D554, Barry Silfies, Robert Csencitz, and Independent Workers of North America,

Appellants.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

(D.C. Civil Nos. 87-5689/5694/5695/5697/5698/5747)

Present: SEITZ, STAPLETON and COWEN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel December 2, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 21, 1988, be, and the same is hereby reversed insofar as the District Court held that the Locals were entitled to retain their treasuries; affirmed insofar as the determination that the Locals are liable for per capita taxes until the date on which the National Labor Board certifies the Independent Workers of North America as the legal representative of the Locals; and, affirmed insofar as the determination as to the claim of tortious interference under section 301. Each party to bear its own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Certified as a true copy and issued in lieu of a formal mandate on March 9, 1989

February 1, 1989 Test:

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1379

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, et al, *Appellant in 88-1379*

v.

LOCAL LODGE D504, et al.
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Charles W. Jones, Donald Whan and Henry Harden,

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No. 88-1395

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, et al.

v.

LOCAL LODGE D504, et al. Local Lodge D17, Gary Marositz, Richard Gross, James Begies, Local Lodge D54, George Mayer, Alexander Szoke, Local Lodge D376, Ruel Oswald, Robert Vogel, Jeffrey Fenstenmachaer, Local Lodge D504, Wilfred Brumbaugh, Norman Hoover, Robert Burk, Local Lodge D547, Richard Yelles, Wainwright Beal, Ronald Silfies, Local Lodge D554, Barry Silfies, Robert Csencitz, and Independent Workers of North America,

Appellants in 88-1395

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Civil No. 87-5689/5694/5695/5697/5698/5747)

Argued December 2, 1988

Before: SEITZ, STAPLETON and COWEN,
Circuit Judges

(Filed February 1, 1989)

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OPINION OF THE COURT

COWEN, *Circuit Judge*.

This appeal arises from an order of the district court denying plaintiffs' claims against six Local Lodges and their officers in a dispute over ownership of

the Local Lodge treasuries. After a bench trial, the court issued an order holding that the defendant Locals are entitled to retain their treasuries. The order further directed that judgment be entered in favor of the plaintiffs and against the Local Lodges and their officers for unpaid per capita taxes until the date of NLRB certification of a rival union, the IWNA. Finally, the court entered judgment against the IWNA for tortious interference with the obligation of the Local Lodges to pay per capita taxes to the plaintiffs.

Upon review, we will reverse the district court's determination that the Local Lodges are entitled to retain their treasuries. We will affirm the court's ruling that the Local Lodges are required to pay a per capita tax until the date of the NLRB certification of the IWNA. Finally, we will affirm the district court's determination pertaining to plaintiff's claims of alleged tortious interference under section 301 of the Labor Management Relations Act.

I.

This case consists of six cases which have been consolidated for pretrial, trial and post-trial purposes. The main plaintiff in these cases is the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers ("Boilermakers").[1] The Boilermakers is an unincorporated labor organization within the meaning of section 2(5) of the National Labor Relations Act ("NLRA"). The defendants are six local unions and their officers, including the named defendant, Local Lodge D504 as well as Local Lodges formerly known as D17, D54, D554, D376 and

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1. There are numerous other plaintiffs in this action. For convenience we will refer to the plaintiffs collectively as the "Boilermakers."

D547 ("Locals").[2] In the six complaints, the Boilermakers claim entitlement to all books, records, properties funds and assets currently held by the Locals.

In 1983, the Boilermakers began discussions with the Cement, Lime, Gypsum and Allied Workers International Union ("Cement Union") concerning a possible merger of the two organizations.[3] Merger negotiations were conducted for a period of approximately two years before a final Merger Agreement came to fruition on April 1, 1984. App. at 2580.

The dispute over the treasuries began following the Locals' disaffiliation from the Boilermakers. The events leading to the disaffiliation began with the first Consolidated Convention following the merger which was held in August of 1986. At that convention, there was disagreement over who was eligible to vote for the International vice president. As a result of a decision against restricting eligible voters to the Cement Division of the Boilermakers, the former Cement Union president, Richard Northrip, was not elected to a vice presidency of the Boilermakers. Northrip and those who supported him then formed the Independent Workers of North America ("IWNA"). The IWNA sought to become the bargaining agent for Boilermaker Local Lodges which formerly were Local Unions in the Cement Union.

Prompted by the defeat of the Cement Union's candidate for the International Vice-President at-large of the Boilermakers, the members of each defendant

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2. In the nomenclature used by the parties, Boilermaker Locals are designated as Local Lodges and Cement Union Locals are designated as Local Unions.

3. At that time, the Cement Union was governed by its own International Constitution.

Local Lodge held an internal vote and in each case, the members voted to disaffiliate from the Boilermakers.[4] Many of the former Cement Union employees then joined the rival IWNA. Between November 4, 1986 and February 9, 1987, the IWNA filed six petitions with the National Labor Relations Board ("NLRB") seeking elections for certification of a new bargaining representative at locations where a Boilermakers' Local Lodge was currently certified as the bargaining representative.[5] App. at 2299-2304. The six Locals involved in the instant litigation authorized and directed that their Local assets continue to be held in trust for the benefit of the workers. Pursuant to the internal disaffiliations which followed, all of the rank and file members of the Locals purported to resign their membership in the Boilermakers. In accordance with their resignations and disaffiliations, each of the Locals ceased sending per capita tax payments to the Boilermakers.[6] The Boilermakers claimed that the NLRB elections effectively reduced the membership of the six Locals to zero. On this basis, the Boilermakers' President then notified the officers of the Locals that they were disbanded in accordance with the provisions of Article V, section 6 of the International Constitution.[7] Although they were requested to turn

4. It was the Cement Union's desire to be able to select its own International Vice President until the Twenty-Eighth Consolidated Convention -- a date which coincides with the expiration of the Merger Agreement itself.

5. In each case, an election was conducted by the NLRB and the IWNA was certified as the new bargaining representative, thereby ousting the Boilermakers at those locations.

6. The parties stipulated that the amount of per capita tax withheld until the time of the NLRB elections totalled $39,000.00.

7. Several other Locals have disbanded. In each case, Northrip sent a standard "disbanding" letter requesting the assets of the Local to be sent to the Boilermakers pursuant to Article V, section 6, app. at 1775, which required surrender of the Locals' assets. See Appellant's Brief at 14-15.

over all of the books, records, properties, funds and assets of the Local Lodge to the International Union, each Local refused to do so and this litigation ensued.

Two contracts form the basis of the present dispute -- the Merger Agreement and the Boilermakers' constitution. Both the Boilermakers and the Locals claim ownership of Local Union treasuries based on several provisions of these contracts. The Boilermakers' claim to the treasuries is founded upon Article V, section 6 and Article XXXVI, section 2 of their constitution (the "surrender" clauses) which they claim require the surrender of the treasuries upon the disaffiliation of the Locals. Article V, section 6 of the Boilermakers' Constitution provides in pertinent part:

> Any local lodge having less than ten (10) active members shall be automatically disbanded and its Charter returned to the International Brotherhood, together with all books, records, properties, funds and assets (including trusts, trust funds or other trust properties held, operated or controlled by such Local Lodge) owned or held by such Local Lodge at the time of such disbanding, which shall become the property of the International Brotherhood.

App. at 1775-76. Article XXXVI, section 2 of that constitution provides:

> Section 2. The funds and property of a subordinate body are trust funds for the benefit of its members and shall not be divided in any manner among the members of the subordinate body. Upon the surrender, forfeiture or revocation of its charter other than through consolidation, all funds belonging to such subordinate body shall be forwarded promptly to the International Secretary-Treasurer and all real estate and other property owned or held by such body shall be

> immediately transferred and conveyed by the proper legal instrument to the International Board of Trustees of the International Brotherhood. . . . All such funds shall revert to the General Fund of the International Brotherhood with proper record of the transfer maintained by the International Secretary-Treasurer. In the event such subordinate body should ever be rechartered at that location, the Executive Council is authorized to give approval to the transfer of an amount not to exceed fifty percent (50%) of such funds from the General Fund to the credit of the rechartered subordinate body.

App. at 1903-04.

The Locals' claim to the treasuries is based on several provisions of the Merger Agreement including the preamble, the "retain clause," and the "transfer clause." The preamble of the Merger Agreement provides that:

> The Constitution of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers will be the supreme law of the merged organization. All provisions of this Agreement are binding and those provisions which conflict with the above referred to Constitution will expire at 12:01 a.m. on the convening date of the Twenty-Eighth Consolidated Convention [1991].

App. at 2580. The preamble was intended to apply in cases in which the Merger Agreement conflicted with the constitution. The "retain clause" of the Merger Agreement provides that "Local Union charters held by the current local unions in the United Cement, Lime, Gypsum and Allied Workers International Union will have issued in their stead Boilermaker Charters carrying the present local numbers preceded by a capital D. Each Local Lodge will retain its Local Union

treasury." App. at 2581. The Merger Agreement was organized to "track" -- or refer to -- the provisions of the Boilermakers' constitution. However, the Merger Agreement's retain clause makes no mention of Article V, section 6 or Article XXXVI of the constitution -- the provisions requiring reversion of the Locals' assets to the Boilermakers upon disbandment. The Merger Agreement's "transfer clause" provides that:

> On the effective date of the merger all property; real, personal, and mixed; and all rights, titles, and interest; either legal or equitable; and any monies, funds or properties; tangible or intangible, of the United Cement, Lime, Gypsum and Allied Workers International Union and affiliated District Councils shall, by virtue of the merger, be transferred to and vested in the merged organization in accordance with the Constitution.

App. at 2587.

The Merger Agreement also contains a provision regarding separation that would permit the cement workers to leave the Boilermakers should a majority of the merged organization decide that the merger was not working out as expected. Counsel for the Boilermakers asserted at oral argument that the difference between the constitution and the Merger Agreement regarding separation was the primary justification of the "conflict" provision in the preamble.[8] The Locals contend, however, that the

8. The constitution prohibits disaffiliation. Article XXIX, section 2(a) provides that a member may not "evade or avoid his responsibility to the Organization as an institution, or engage in or advocate any conduct that would interfere in the Organization's performance of its legal or contractual obligations or functions." App. at 1820-21. Article XVII, section 1(i) makes encouraging or engaging in a secessionist movement a chargeable offense. App. at 1793-94.

primary justification for the provision is an alleged conflict among the provisions regarding retention of the treasuries.

The district court heard extrinsic evidence pertaining to the intent of the parties and received oral argument from counsel concerning the proper interpretation of the provisions of the Merger Agreement. The court held that, based on the language of the agreements which the court found conflicting, the Locals were legally entitled to keep their treasuries pursuant to the preamble in the Merger Agreement. The district court entered judgment in favor of the Boilermakers for per capita tax payments which the Locals had ceased making to the Boilermakers. The Boilermakers now appeal that portion of the decision denying possession by the Boilermakers of the Locals' treasuries. The individuals and the IWNA appeal from the portion of the decision granting judgment in favor of the Boilermakers with respect to per capita tax payments. We have jurisdiction over the appeal under 28 U.S.C. § 1291 (1982).

III.

A. *Right to the Treasuries.*

The Boilermakers argue on appeal that after the merger, the Boilermakers' constitution became the supreme governing document. Under the Boilermakers' constitution, a Local Lodge with less than ten members is automatically disbanded and its assets revert to the Boilermakers. When the Local Lodges voted to decertify the Boilermakers, they then had no members at all, and thus, the Boilermakers contend that the surrender clauses became operative. They further contend that the surrender clause, which states that the Local Lodges must surrender "properties, funds and assets," compels the Locals to surrender their treasuries. The Boilermakers reach

this conclusion based on their contention that the term "assets" in the surrender clause encompasses the treasuries of the Local Lodges. Additionally, they point out that the retain clause of the Merger Agreement was merely an administrative device to prevent the Locals' treasuries from being transferred into the Boilermakers' general fund after the merger.

The Locals argue that the retain clause of the Merger Agreement permits them to keep their treasuries even after decertification. They reason that the only way to give proper meaning to the various "retain" and "surrender" provisions of the documents is to conclude that the Locals must "not be subjected until 1991 to a loss of their treasuries as would otherwise be required under the Boilermakers' Constitution." Appellees' Brief at 27. The Locals' contention is based on their theory that the clauses (the retain and transfer and surrender clauses) conflict. They point to the fact that the Locals were included in earlier drafts of the above-cited transfer clause but were not included in the final draft of the clause. App. at 2480l. They argue that the conspicuous exclusion of the Locals from the transfer clause mandates the conclusion that it was intended that the Local not be subjected until 1991 -- pursuant to the conflict provision in the preamble -- to a loss of their treasuries as would otherwise be required under the Boilermakers' constitution.

As a preliminary matter, we must ascertain whether this case calls for construction, rather than interpretation, of the contracts. Courts must determine "as a matter of law which category written contract terms fall into -- clear or ambiguous." *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1011 (3d Cir. 1980)(citations omitted). This Court has stated that "[w]hen the issue is one of 'construction' as distinguished from 'interpretation' of

the contract, the issue is one of law." *Ram Constr. Co., Inc. v. American States Ins. Co.*, 749 F.2d 1049, 1053 (3d Cir. 1984). In this case, the district judge construed -- as opposed to interpreted -- the Merger Agreement. *See* App. at 599 (stating that "I will enter judgment for the defendants because the Merger Agreement is unambiguous in a legal sense and the extrinsic evidence of any contrary intent from the plain meaning of the words is factually insufficient to establish such a contrary intent."). We agree that we must construe the Merger Agreement and thus we have plenary review. *Accord International Bhd. of Boilermakers v. Local Lodge D111*, 858 F.2d 1559, 1561-62 (11th Cir. 1988) (finding that, "[i]n reviewing the district court's findings that the contract is unambiguous, we examine the disputed contractual terms in the context of the entire agreement [and] . . . [g]iven the plain language of these agreements, we find the district court's conclusions reasonable").[9] Although we agree that the documents should be construed, we hold that the district judge in this case erred in his construction.

Unlike the district judge, we read the Merger Agreement and the Boilermakers' constitution to be reconcilable. Nearly every court which has construed this identical language has reached the same conclusion. *See, e.g., International Bhd. of Boilermakers v. Local Lodge D111*, 681 F. Supp. 1570 (S.D. Ga. 1987), *aff'd*, 858 F.2d 1559 (11th Cir. 1988); *International Bhd. of Boilermakers v. Local Lodge D238*, 678 F. Supp. 1575 (M.D. Ga. 1988);

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9. The Court of Appeals for the Eleventh Circuit in *Local Lodge D111* -- a case construing the identical language -- agreed with the district court's conclusion in that case that "International was entitled to judgment as a matter of law since the only issues presented concerned unambiguous contractual language and involved no genuine questions of material fact." 858 F.2d at 1561.

International Bhd. of Boilermakers v. Local Lodge D405, No. 87-24 PCT-EHC, slip op. (D.C. Ariz. April 21, 1988). *See also International Bhd. of Boilermakers v. Local Lodge D474*, 673 F. Supp. 199, 205 (W.D. Tex. 1987) (holding that the Boilermakers trusteeship upon the local was valid and ordering the defendant local to relinquish to the trustee all assets of the local). We agree with these courts that the correct construction of the retain clause in the Merger Agreement is that as long as a Local continues to exist, the Local may retain the treasury of the former Cement Worker Local Union. However, if the Lodge ceases to exist as a Boilermaker entity, the surrender clauses of the Boilermaker constitution apply. The Merger Agreement, therefore, has no provision for the retention of Local treasuries after the Lodge has disbanded.

The district court read the word "treasuries" -- a word not found in Article V or Article XXXVI of the constitution -- to entitle the Locals to retain their monies notwithstanding disaffiliation. We find, however, that the district court erred in its construction -- not only of the word "treasuries", but of the contracts as a whole. First, the retain clause of the Merger Agreement was indexed under Article V, section 3 -- the constitutional provision setting forth the jurisdiction of the Local Lodges. It neither refers to nor modifies Article V, section 6 or Article XXXVI of the constitution, which call for the surrender of Local Lodge assets upon disbandment. Second, the retain clause states that "[e]ach *Local Lodge* will retain its Local Union treasury." App. at 2581 (emphasis added). A "Local Lodge" is a Boilermaker entity. The implication is that only Boilermaker entities are entitled to retain their treasuries. The Merger Agreement does not provide that *members* of the Local Lodge may retain the treasuries after a disbandment. The Agreement provides only that the *Local Lodge*

shall retain the treasury. When the Local Lodge ceases to exist and its charter is revoked, the retain clause no longer applies. Third, the trial court found the word "treasuries" unambiguous, and ruled as a matter of law that the word "is never equated with 'all assets.'" App. at 597. The district court stated that construing "treasury" to mean "all assets" "is crucial to plaintiffs' position because it enables plaintiffs to harmonize the retain clause with the provision set forth in 6(c) above [the Merger Agreement's transfer clause]." App. at 592. However, we believe that the word "assets" found in the surrender clause is the touchstone of this analysis. We construe the word "assets", found in the surrender clause of the Boilermaker constitution, to encompass the treasuries of the Locals. This construction makes the surrender and retain clauses reconcilable as the Local treasuries come within the ambit of the surrender clause.

Since the district court's ruling but prior to the oral argument, the Eleventh Circuit Court of Appeals, in *Local Lodge D111*, rendered its opinion construing the identical Merger Agreement and the Boilermakers' constitution. Unlike the district court in the present case, the Court of Appeals for the Eleventh Circuit in *Local D111* found that "Local D111's contention that the retain clause conflicts with the forfeiture clauses is without merit", 858 F.2d at 1562, and that "the plain language of these provisions shows that they are consistent." *Id.* The court reasoned that "[w]hile the merger agreement permitted the locals to maintain control over their assets and treasury while affiliated with International after the merger, once the local no longer existed, it lost this control. This reading of the two clauses is clear and unambiguous." *Id.* We agree. We similarly construe the contracts to require that, once the Locals end their affiliation with the International, they can no longer exercise control over

the assets pursuant to the Merger Agreement. The Merger Agreement does not extinguish the Boilermakers' right to the surrender of the Local Lodge treasuries upon disbandment. We do not read the retain clause to conflict with the surrender clause in Article V, section 6 of the constitution. The language of both clauses can be read together and both can be given effect.

B. *Liability for Per Capita Taxes.*

The district court ruled that the Locals were obligated to pay per capita taxes until the date of NLRB certification of the Locals as affiliates of the IWNA. App. at 600.[10] We agree and, therefore, we will affirm this portion of the district court's ruling. *Accord Local Lodge D111*, 858 F.2d at 1564. The Boilermakers, even after the Locals' internal disaffiliation votes, remained the bargaining agent for the Locals until the National Labor Relations Board decertification. *See Local Lodge D405*, No. 87-24-PHT-EHC, slip op. at 16 (stating that "[u]ntil the appropriate procedures were completed to remove the International as the bargaining representative, the existing certification must be honored") (citation omitted). Moreover, the Boilermakers provided support services to the Local Lodges until decertification. We hold that the per capita tax is due from the Local Lodges for each member until the date of decertification provided the

10. Members of each Boilermakers Local Lodge owe to the Local Lodge monthly dues. App. at 1822. Each Local Lodge owes the Boilermakers a per capita tax based on dues receipts of the Local Lodges. App. at 1786-87. Each member of the Locals was asked to sign a Dues Revocation and Dues Authorization Card, purporting to revoke prior dues authorizations and requesting that dues be sent by employers to a new local of the IWNA. App. at 2615. It was only after these cards were signed that petitions were filed with the NLRB, seeking certification of the IWNA as the bargaining agent representative of these employees. *See* Appellant's Reply Brief at 35.

member remained employed and remained a member of the Local Lodge regardless of whether the Lodge considered itself disaffiliated and regardless of a particular member's belief that he was or was not a Boilermaker. *See, e.g., International Bhd. of Boilermakers v. Local Lodge D31*, 694 F. Supp. 1203 (D. Md. 1988).[11]

C. *Preemption of State Law Claims.*

The Locals argue on their cross appeal that the district court erred in failing to find that the Boilermakers' state claims for tortious interference are preempted under 29 U.S.C. § 185. Appellee's Brief at 39. They contend that the district court did not predicate its findings of tortious interference upon federal common law. However, the Boilermakers did allege in their complaint the following:

> 37. By its receipt and continued control over assets of the International Union, the IWNA is tortiously interfering with the contractual relations of the International Union and its Local Lodges in violation of Section 301 of the Labor Management Relations Act.

App. at 459. We affirm the order of the district court

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11. There the court stated that:

> There can be no doubt that the will of Local 31 is to become disaffiliated from the IBB and to become affiliated with the IWNA. And on the other side the IBB would like to prevent disaffiliation. These issues are for the NLRB to decide pursuant to a Board certified election. That election may be in the offing in accordance with established procedures, but it has not yet taken place. The informal votes of members, as occurred here, will not effect a disaffiliation and cause an affiliation with another union.

694 F. Supp. at 1206-07.

based on Section 301.[12] We find the claim of tortious interference to be properly pursued under Section 301. *See Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 381 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) (holding that "a claim of tortious interference with a labor contract is one arising under federal common law over which the district court has jurisdiction.").

IV.

In conclusion, we find that the district court erred in holding that the Locals are entitled to retain their treasuries and we will reverse this part of its judgment. We affirm the district court's determination that the Locals are liable for per capita taxes until the date on which the NLRB certifies the IWNA as the legal representative of the Locals. Finally, we affirm the district court judgment as to the claim of tortious interference under section 301. Each party to bear its own costs.

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12. Section 301 provides: "Suits for violation of contracts between an employer and a labor organization representing employees . . . or between any such labor organizations, may be brought in any district court of the United States . . . ." 29 U.S.C. § 185(a) (1982).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

International Brotherhood of Boilermakers, et al.,	:	Civil Action No. 87-5689
	:	Allentown, Pennsylvania
vs.	:	April 19, 1988
	:	9:25 o'clock a.m.
Local Lodge D504 Cement, et al.	:	
.....	:	

NON-JURY TRIAL – VOLUME EIGHT
BENCH OPINION
FINDINGS OF FACT
BEFORE THE HONORABLE EDWARD N. CAHN, J.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: BRUCE E. ENDY, ESQUIRE
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Philadelphia, PA 19102

For the Defendants: MICHAEL N. KATZ, ESQUIRE
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Audio Operator: Kris Dragotta
Transcribed By: Mary Morrow

Proceedings recorded by Electronic Sound Recording; transcript produced by transcription service.

(Excerpt of the requested portion of the trial, Day Eight.)

THE COURT: All right. I'm now in a position to deliver the Bench Opinion. Before I do so, I want to again state my appreciation to the attorneys who were extremely well prepared and diligent in this case and helped me understand the case as best I've been able to, and cooperated with me in every phase of the case.

As I said earlier, I am of the opinion that the leadership on both sides of this controversy should have made greater efforts to resolve the controversy amicably but I understand that feelings run high in this situation and that you need me to make the decision.

I also want to state that I reserve the right in the Bench Opinion to add citations and footnotes. And I also reserve the right in the Bench Opinion to correct errors in grammar, syntax, spelling and citations.

We'll now begin the Bench Opinion.

BENCH OPINION
FINDINGS OF FACT

1. The plaintiffs are: a) the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers ("Boilermakers") an unincorporated association and labor organization within the meaning of Section 2(5) of the National Labor Relations Act, 27 U.S.C., 152(5) (1982), with its principal office located at 565 New Brotherhood Building, Kansas City, Kansas, 66101;

b) Charles W. Jones in his capacity as trustee for the Boilermakers;

c) Donald Whan in his capacity as trustee for the boilermakers;

d) Henry Harden in his capacity as trustee for the Boilermakers;

2. The defendants are: a) Local Lodge D504 and its officers Wilfred Brumbaugh, Norman Hoover and Robert Burk;

b) Local Lodge D54 and its officers George Mayer and Alexander Szoke;

c) Local Lodge D-376 and its officers Ruel Oswald, Robert Vogel and Jeffrey Fenstenmachaer;

d) Local Lodge D547 and its officers Richard Yelles, Wainwright Beal and Ronald Silfries;

e) Local Lodge D17 and its officers Gary Marosits, Richard Gross and James Begies;

f) Local Lodge D554 and its officers Barry Silfies and Robert Csencitz;

g) Independent Workers of North America (IWNA) an unincorporated association within the meaning of Section 2(5) of the National Labor Relations Act, 29 U.S.C. 152 (5) (1982), with its principal place of business located 700 Ogden Avenue, Suite 207, Chicago, Illinois, 60559.

3. The United Cement, Lime, Gypsum and Allied Workers International Union (Cement Union) was an unincorporated association and a labor organization within the meaning of Section 2(5) of the National Labor Relations Act, 29 U.S.C., 152(5) (1982), with its principal office located at 2500 Brickvale Drive, Elk Grove Village, Illinois, 60007.

In the early 1980's the cement industry in the United States experienced economic difficulties and membership in Cement Union was in a state of decline.

5. After lengthy negotiations, the Cement Union merged into the Boilermakers in accordance with a Merger Agreement dated April 1, 1984.

6. The Merger Agreement provided in part: a) "All provisions of this Agreement are binding and those provisions which conflict with the above referred to Constitution will expire at 12:01 a.m. on the convening date of the Twenty-Eighth Consolidated Convention."

b) Local Union charters held by the Local Unions in the United Cement, Lime, Gypsum and Allied Workers International Union will have issued in their stead Boilermaker Charters carrying the present local numbers preceded by a capital D. Each Local Lodge will retain its Local Union treasury."

c) "On the effective date of the merger all property; real, personal, and mixed; and all rights, titles, and interest; either legal or equitable; and any monies, funds or property; tangible or intangible, of the United Cement, Lime, Gypsum and Allied Workers International Union and affiliated District Councils shall, by virtue of the merger, be transferred to and invested in the merged organization in accordance with the Constitution."

7(a): The first Consolidated Convention following the merger was held in Florida in August of 1986. At that convention events transpired which generated disillusionment on the part of former members of Cement Union;

b) At the convention the former president of the Cement Union was not elected to a vice presidency in the Boilermakers;

c) Following the convention former officials, who had been employed by the Boilermakers, but who had supported the former Cement Union president, were terminated as Boilermaker employees.

8. The former Cement Union president, Mr. Northrip, then formed the IWNA.

9. The IWNA has sought to become the bargaining agent for Boilermaker Local Lodges which formerly were Local Unions in the Cement Union. In the nomenclature used by the parties, Boilermaker Locals are designated as Local Lodges and Cement Union Locals are designated as Local Unions.

10. In regard to each of the Local Lodge defendants, the Local members held an internal vote wherein in each case they voted overwhelming to disaffiliate from

the Boilermakers. In no case was actual or constructive notice of these internal elections given to the Boilermakers.

11. Subsequent to the internal elections referred to in paragraph 10 above each Local Lodge voted (with overwhelming majorities) in a National Labor Relations Board decertification proceeding to decertify the Boilermakers as its bargaining representative.

DISCUSSION

There are a number of claims, set offs and counterclaims in these six cases which have been consolidated for pretrial, trial and post-trial purposes. I will now consider these various claims.

The main claim of the plaintiffs is their right to all of the assets of the six Local Lodges. The conceptual underpinning for this claim is as follows. The Cement Union was merged into the Boilermakers. The Boilermakers' Constitution became, on and after April 1, 1984, the governing document. Under the Boilermakers' Constitution a Local Lodge with less than ten members is automatically disbanded and its assets revert to the Boilermakers. When the Local Lodges voted to decertify the Boilermakers, they in effect had no further members at all and thus, the Boilermakers contend the reverter clause became operative.

The Local Lodges urge (the Local Lodges are being represented by counsel who has appeared for INWA) that the Merger Agreement supersedes the Constitution and the provision set forth in 6(b) above (the retain clause) allows a Local Lodge to keep its treasury.

The plaintiffs, in rebuttal to the application of the retain clause, note that two district courts in Georgia have considered this issue and have ruled that the retain clause refers to Local Unions retaining all of their assets as of the date of the merger and that thereafter it has no further effect. The plaintiffs urge that I adopt this point

of view. With deference to the Georgia District Courts, I decline the invitation.

I note that I have heard extensive extrinsic evidence of the intent of the parties and have received oral argument from the attorneys as to the proper interpretation of the provisions of the Merger Agreement. The parties agree that the Merger Agreement supersedes the Boilermakers' Constitution to the extent it is in conflict with the Constitution, until sometime in 1971 (the date of the Twenty-Eighth Consolidated Boilermakers' Convention). The plaintiffs maintain, however, that those negotiating the Merger Agreement used the word "treasury" to mean "all assets." What makes this issue extremely difficult is that negotiators on both sides testified that they had Local Union assets in their minds when they used the term "treasury." Plaintiffs vigorously suggest that therefore in the parties' lexicon "treasury" equals "all assets."

A finding to this effect is crucial to plaintiffs' position because it enables plaintiffs to harmonize the retain clause with the provision set forth in 6(c) above. In that provision "all property; real, personal, and mixed" was transferred to the Boilermakers from the Cement Union (International) and its affiliated district councils. However, although in earlier drafts the Local Unions were included in this transfer provision, they (the Local Unions) were not included in the final Merger Agreement. According to the plaintiffs, the retain clause applies to all assets to prevent those assets from reverting to the Cement Union (under similar provisions in the Cement Union Constitution) and from there to the Boilermakers in accordance with the Merger Agreement. In *International Brotherhood of Boilermakers versus Local Lodge D111, CV 487, (Southern District Georgia,* December 15, 1987) the Court explained its rationale as follows:

"Defendants argue that this provision ("Retain Clause") conflicts with the Surrender Clauses and is

controlling. The defendants' argument is unavailing. The Surrender Clauses in the Constitution and the Retain Clause in the Merger Agreement are not in conflict, and may be easily reconciled."

"The Merger Agreement governed *the effect of the merger* on local treasuries. Pursuant to the Merger Agreement, local lodges, including Local Lodge D111, did not have to surrender their treasuries upon consummation of the merger. The local lodges retained and exercised independent control over, their treasuries. Local Lodge D111 received the benefit of the retain clause; during D111's existence as a Local Lodge of IBB, it retained its treasury.

"The Merger Agreement does not provide, however, that the *members* of a local lodge may "retain" the local treasury after the local lodge has disbanded and dissolved. The Merger Agreement provides only that the local lodge shall retain the local treasury; when the local lodge ceases to exist and its charter is duly revoked, the Retain Clause no longer applies. The Merger Agreement does not address the contingency of disbandment of a local lodge. The Constitution, however, does address the contingency of disbandment. The Constitution provides that, in the event of disbandment, funds and assets of the local are forfeited to the plaintiff."

There are some problems with this rationale. Initially, I hold that the word "treasury" is not ambiguous. In lay as well as in legal usage "treasury" is never equated with "all assets". The reason the negotiators testified that they equated the terms is that at regional meetings of the Cement Union when Cement officials were seeking rank and file support for the merger, specific concern for safeguarding Local treasuries arose. The retain clause was inserted into the Merger Agreement to satisfy these concerns of the rank and file.

In most cases the Local's treasury is its primary asset and that is true in regard to the six local lodges who

are defendants here. The insertion of the retain clause was unrelated to any concern about avoiding bookkeeping entanglements connected with the transfer of funds from Cement Union Locals to the New Locals which would be designated as Boilermaker Local Lodges.

Contrary to the plaintiffs' assertion, the "retain clause" was not placed in the Merger Agreement for the sole purpose of circumventing the forfeiture provision of the Cement Union's Constitution. This end was accomplished by the deletion of Local Unions from the transfer clause. Therefore, the retain clause cannot be harmonized with the Merger Agreement unless it is given some further meaning beyond confirmation that no transfer of Local assets is to take place as of the date of the merger. The retain clause clearly had a continuing purpose until 1991 of protecting the rights of the rank and file of the Cement Union to their Local treasuries. The insertion of the retain clause was for that specific purpose. There is nothing in the Merger Agreement to suggest that the retain clause is applicable only if a Local Lodge remains in the Boilermaker fold. The whole purpose of the "retain clause" is to protect Cement Union Local Treasuries from the Boilermakers. Therefore, I will enter judgment for the defendants because the Merger Agreement is unambiguous in a legal sense and the extrinsic evidence of any contrary intent from the plain meaning of the words is factually insufficient to establish such a contrary intent.

The second claim of the plaintiffs is for the payment of per capita tax due from the Local Lodges until the date of the National Labor Relations Board decertification. Here the plaintiffs must prevail. The Boilermaker Constitution provides that each Local Lodge must pay a per capita tax to the Boilermakers for each member. The defendants do not dispute this obligation. Their defense is that there is no per capita tax due after an internal Local Union votes to disaffiliate from the Boilermakers.

The internal vote is not effective to accomplish this purpose. In every instance the Local Lodge failed to give actual or constructive notice to the Boilermakers of the internal vote. For a disaffiliation vote to be effective, the Local Lodge must provide its members with an adequate opportunity to consider opposing viewpoints. *Intern. Broth. of Boilermakers versus Local Lodge D474, 673 F. Supp. 199, 203 (W.D. Text 1987).* A fallback position of the defendants is that the individual members resigned from the Boilermakers and notified their employers as well as their Local Union officers that their dues were no longer to be collected on behalf of the Boilermakers. In actuality, however, the Boilermakers remained the bargaining agent for the Local Lodges until the National Labor Relations Board decertification. The Boilermakers provided support services to the Local Lodges until that date. The per capita tax is due from the Local Lodges for each member until the date of the decertification provided that the member remained employed and remained a member of the Local Lodge irrespective of whether the Local Lodge considered itself disaffiliated and irrespective of a particular member's mental process that he or she was no longer a Boilermaker.

Granting plaintiff's claim in regard to the per capita tax matter makes it necessary to consider the Local Lodges' defenses. The six Local Lodges claim that the Boilermakers violated the Merger Agreement in at least two ways. First the Local Lodges urge that the failure to elect an international vice president at large, with the electors being restricted to former Cement Union Workers, violated the Merger Agreement. Second, the Local Lodges claim that the termination of certain International representatives who served their Local Lodges also violated the Merger Agreement. I will not consider these claims either as setoffs or counterclaims. The provisions the defendants claim the Boilermakers violated are independent covenants and even if violated would not excuse the defendants from their obligations

to pay the per capita tax pursuant to the Boilermaker Constitution. These particular claims are pending in other litigation and are being pursued by the parties and persons most affected by the outcome. For these reasons the setoffs will not be allowed in this case and the counterclaims will be dismissed without prejudice.

One final issue needs comment. The plaintiffs seek to impose a judgment against IWNA for tortious interference with the Boilermakers' right to receive per capita payments from the Local Lodges. In this regard I must grant the plaintiffs' claim. The IWNA had a perfect right to express disillusionment among Boilermaker Lodges and seek to have members of those Lodges disaffiliate from the Boilermakers and affiliate with IWNA. However, IWNA had no right to interfere with the contractual obligation of the Local Lodges to pay per capita tax to the Boilermaker International. The evidence is uncontradictory that IWNA did just that and assisted the Local Lodges in attempts to avoid their obligation to pay the per capita tax due. Consequently, judgment will be entered against IWNA in regard to the amount of per capita tax due. The parties have stipulated as to the amount of per capita tax due for the purposes of a final order in this case and their stipulation will be incorporated in that final order.

I reach the following:

CONCLUSIONS OF LAW

1. This Court has subject-matter jurisdiction pursuant to 29 U.S.C. §185.

2. Proper venue lies in this Court.

3. This Court has in personam jurisdiction over the parties who have appeared here by counsel and in person.

4. In regard to plaintiffs' claims to the treasuries of the six Local Unions, judgment will be entered in favor of the Local Unions and their officers.

5. In regard to plaintiffs' claims against the six Local Unions and their officers judgment will be entered in favor of the plaintiffs and against the Local Lodges and their officers for unpaid per capita tax until the date of the NLRB certification.

6. In regard to the plaintiffs' claims against the IWNA for tortious interference with the obligation of the six Local Lodges to pay per capita tax to the plaintiffs, judgment will be entered against the IWNA in the amount of $39,730.00.

7. All of defendants' counterclaims will be dismissed without prejudice.

An appropriate order will be entered forthwith.

Now, Counsel, I no longer wish to debate the merits of what I've done. You may do that in the Court of Appeals. I know that both of you would remain as long as necessary to convince me to change the Opinion to your point of view. I'm not willing to do that but if I have misspoken, I would be happy to correct anything editorially, but I will not change my — I do not invite debate on changing my Opinion, only editorial corrections.

MR. KATZ: If I may, your Honor, just two points of clarification so that I understand what your decision and Order intend. With respect to the judgment against the Local Union officers is that a judgment against them individually or solely —

THE COURT: Only in their capacity — the Order will talk about in their official capacities only, that there would be some subsequent concern about unauthorized distributions. In an enforcement of judgment proceeding I will determine whether they've done something else that would trigger individual liability, but at the moment I do not have that before me and I'm not going to enter any judgment against them in their individual capacities.

MR. KATZ: And with respect to the judgment against the IWNA relating to the per capita tax do I

understand that if the Locals pay the per capita tax then the judgment –

THE COURT: Yes –

MR. KATZ: – with respect to IWNA is satisfied?

THE COURT: – that judgment is only to the extent it's not satisfied from the Locals themselves. Mr. Endy, I think agrees – you're not entitled –

MR. ENDY: The fact, we're not entitled to it twice, I agree then.

I have one question for your Honor, your Honor did not treat any question of other books, records and properties?

THE COURT: You're right. You're right. I had – and I made a note to do it before I came in here. Have you worked that out?

MR. ENDY: No, we really have not been able to it out and my client, while they were here, took the position that while we would certainly accept those items, we wanted a judgment from the Court in that respect and that was where they left me.

MR. KATZ: Your Honor, I had indicated previously to the Court that with respect to file cabinet, typewriter whatever records there may be that we are not standing on any formalities and making a claim of resistance – we don't feel we have a justifiable issue there. We're willing to give them back their file cabinet if they want that or their typewriter.

THE COURT: This is what I'll do in that regard. If you can't work it out with Mr. Katz in light of what he just said I will – after I file my final Order, which I'm going to go to my office now and dictate to my secretary, I will allow – you may petition to modify the final Order to include a turnover for the typewriters, desks, chairs and copying machines.

MR. ENDY: Very good. I only have one final housekeeping matter, Judge.

There were a number of exhibits which were neither introduced or offered but which sit in that box on

your desk, unless you want them for some reason, if you'd like me to go through that at some point and remove those exhibits that were not offered or admitted, I'm willing to do that.

THE COURT: Why don't we do that together. I'm going to go back in my office and then I'd like to clean my bench and we can do that together and I think we can – I'm going to need to keep the evidence until I get a transcript of the Bench Opinion back because I may want to change something in the Bench Opinion or add a footnote or a citation at some point and I'm going to need the evidence for that. After that you may pick the evidence up or I'm even willing to bring it to Philadelphia and you can pick it up in my Philadelphia office.

MR. KATZ: One other matter, Judge. In the absence of any agreement from plaintiffs to hold off further proceedings to execute on the per capita judgment it is our intention to request the Court for a stay pending appeal, would you like to –

THE COURT: Let me suggest something. I would be willing to entertain – I think if you speak to Mr. Endy and can assure him that your – and this would be in the interest of your Local officials in their official capacity, that nothing is going to be done to dissipate the treasuries, and if he can be assured in some way that those treasuries are going to remain intact until the Court of Appeals reviews this matter, I think he will agree with you that he won't execute on it, but you're going to have to give him some assurance. If you two can't get together on assurance, I will entertain a petition on a supersedeas, but Mr. Endy has to be given an opportunity to reply.

MR. KATZ: Thank you, sir.

THE COURT: But it's my intention to freeze the status quo until a higher Court takes a look at it. It's very close issues here. Two other Judges saw the case differently than I did and I have no monopoly on truths. So others may – in fact, you both disagree with me, so

it's possible the Court of Appeals will also disagree with me. Can we accomplish anything else, counsel?

MR. KATZ: I have nothing else, sir.

MR. ENDY: No, I don't think I have anything else.

THE COURT: Again, excellent lawyering by both of you and I was pleased with the way you conducted yourselves in this Court. This Court stands adjourned.

MR. KATZ: Thank you, your Honor.

MR. ENDY: Thank you, your Honor.

(Adjourned at 4:25 p.m.)

CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

_____ _____

Geraldine C. Laws Date
Laws Transcription Service

_____

Mary Morrow

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

International Brotherhood of Boilermakers, et al.	:	
v.	:	Civil Action No. 87-5689
Local Lodge D504	:	
International Brotherhood of Boilermakers, et al.	:	
v.	:	Civil Action No. 87-5694
Local Lodge D54	:	
International Brotherhood of Boilermakers, et al.	:	
v.	:	Civil Action No. 87-5695
Local Lodge D376	:	
International Brotherhood of Boilermakers, et al.	:	
v.	:	Civil Action No. 87-5697
Local Lodge D547	:	
International Brotherhood of Boilermakers, et al.	:	
v.	:	Civil Action No. 87-5698
Local Lodge D17	:	
International Brotherhood of Boilermakers, et al.	:	
v.	:	Civil Action No. 87-5747
Local Lodge D554	:	

ORDER

AND NOW, this 20th day of April, 1988, following a bench trial and oral argument and for the reasons set forth in a Bench Opinion dictated April 19, 1988, IT IS ORDERED AND DECREED as follows:

1. In regard to plaintiffs' claims relating to the treasuries of the local lodges, judgment is hereby ENTERED against the plaintiffs and in favor of the defendants.

2. In regard to plaintiffs' claims relating to per capita tax,

(a) Judgment is hereby ENTERED in the amount of $7,793.00 in favor of the plaintiffs and against Local Lodge D17 and the following officers of Local Lodge D17 in their official capacities: Gary Marosits, Richard Gross, and James Begies;

(b) Judgment is hereby ENTERED in the amount of $6,779.00 in favor of the plaintiffs and against Local Lodge D54 and the following officers of Local Lodge D54 in their official capacities: George Mayer and Alexander Szoke;

(c) Judgment is hereby ENTERED in the amount of $4,350.00 in favor of the plaintiffs and against Local Lodge D376 and the following officers of Local Lodge D376 in their official capacities: Ruel Oswald, Robert Vogel and Jeffrey Fenstenmachaer;

(d) Judgment is hereby ENTERED in the amount of $4,428.00 in favor of the plaintiffs and against Local Lodge D504 and the following officers of Local Lodge D504 in their official capacities: Wilfred Brumbaugh, Norman Hoover, and Robert Burk;

(e) Judgment is hereby ENTERED in the amount of $15,752.00 in favor of the plaintiffs and against Local Lodge D547 and the following officers of Local Lodge D547 in their official capacities: Richard Yelles, Wainwright Beal, and Ronald Silfries;

(f) Judgment is hereby ENTERED in the amount of $628.00 in favor of the plaintiffs and against Local Lodge D554 and the following officers of Local Lodge D554 in their official capacities: Barry Silfies and Robert Csencitz.

3. In regard to plaintiffs' claims against Independent Workers of North America, judgment is ENTERED in favor of the plaintiffs and against Independent Workers of North America in the amount of $39,730.00. This judgment is to be effective only to the extent plaintiffs do not collect the judgments set forth in the preceding paragraph.

4. All of the defendants' counterclaims are DISMISSED without prejudice.

5. The Clerk of this court is directed to close these cases on the docket of this court for statistical purposes.

BY THE COURT:

_____

Edward N. Cahn, J.

SUPREME COURT, U.S.
FILED
JUN 15
JOSEPH F. SPANIOL
CLERK

No. 88-1902

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LOCAL LODGE D504, D17, D54, D376, D547 and D554 OF THE CEMENT, LIME, GYPSUM AND ALLIED WORKERS, DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; GARY MAROSITZ, RICHARD GROSS, JAMES BEGIES, GEORGE MAYER, ALEXANDER SZOKE, RUEL OSWALD, ROBERT VOGEL, JEFFREY FENSTERMACHER, WILFRED BRUMBAUGH, NORMAN HOOVER, ROBERT BURK, RICHARD YELLES, WAINWRIGHT BEAL, RONALD SILFIES, BARRY SILFIES, ROBERT CSENCITZ
and
INDEPENDENT WORKERS OF NORTH AMERICA,
Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, CHARLES JONES, DONALD WHAN AND HENRY HARDEN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATUTORY PROVISIONS

In addition to the statutory provisions set forth in the Petition for Writ of Certiorari, this case involves the following statutory provisions.

29 U.S.C. § 185:

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent – Entity for purposes of suit – Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and on behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member of his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principle office, or (2) in any district court in which its duly authorized officers or

agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. § 411(a)(2):

§411. Bill of rights; constitution and bylaws of labor organizations.

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

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and
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Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, CHARLES JONES, DONALD WHAN AND HENRY HARDEN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Boilermakers or IBB) is an unincorporated labor organization within the meaning of Section 2(5) of the National Labor Relations Act. (A-5) Currently the Boilermakers is

an International Union having approximately 100,000 members in the United States and Canada. These members belong to some 680 local lodges all of which are parties to the Constitution of the International Brotherhood of Boilermakers. At the International level the Boilermakers maintain a variety of divisions, which facilitate collective bargaining in their respective industries, e.g., the Cement Division, the Railroad Division, the Shipbuilding Division and the Construction Division. Each local lodge is chartered by the International Union and is required to adopt a uniform set of bylaws that acknowledge the International Constitution as the governing instrument for all the Boilermakers' subordinate local lodges.

In 1983 the Boilermakers began discussions with the Cement, Lime, Gypsum and Allied Workers International Union (Cement Union) relating to the Merger of the two organizations. (A-6) There were approximately 25,000 members in the Cement Union at that time.

There were striking similarities in the two unions' Constitutions with regard to ownership of union property; especially at the local level. Article XXXVI Section 2 of the Boilermakers Constitution provided:

> Section 2. the funds and property of a subordinate body are trust funds for the benefit of its members and shall not be divided in any manner among the members of the subordinate body. Upon the surrender, forfeiture or revocation of its charter other than through consolidation, all funds belonging to such subordinate body shall be forwarded promptly to the International Secretary Treasurer and all real estate and other property owned or held by such body shall be immediately transferred and conveyed by the proper legal instrument to the

International Board of Trustees of the International Brotherhood.

* * *

Similarly Article 15, Section 8 of the Cement Union's Constitution provided:

> Section 8. ***International Union Control Over Local Union Property***
>
> In cases of suspension, revocation of the charter, expulsion, lapsing, or disbanding of any local union for any cause or reason whatsoever, all the funds, property and assets of the local union shall forthwith revert to and become the property and assets of the International Union. The International Secretary Treasurer may authorize, in writing, a member of a nearby local union or another representative to take charge of and to remit to the International Union all of said funds, property and assets of the said local union. *** In the event that such local union is not reestablished, all funds, property and assets shall belong to and become the property of the International Union to be coming led with the other property of the International Union.

Indeed, the Cement Union's Constitution went so far as to provide:

> Article 11, Section 3 **Property Rights**
> Membership in this International Union shall not vest any member with any right, title or interest in or to the funds, property or other assets of this International Union or any subordinate body, whether now owned or possessed or whether hereafter acquired, and each member hereby expressly waives any right, title or interest in or to the funds, property or other assets of this International Union or any subordinate body.

In addition to these clauses that defined what would happen to local union property upon the disbandment of a local, the two Constitutions contained similar clauses that permitted the International union to disband a local. The Cement Union Constitution provided, *inter alia,:*

> Article 15, Section 7 **Disbanding of Local Unions.** So long as seven (7) members thereof remain in good standing and retain employee status in a bargaining union which constitutes the sole jurisdiction of the local union, a local union cannot be disbanded nor can such local union vote or otherwise decide to disband. ***

Article V, Section 6 of the Boilermakers' Constitution provides, *inter alia,:*

* * *

> Any local lodge having less than ten (10) active members shall be automatically disbanded and its Charter returned to the International Brotherhood, together with all books, records, properties, funds and assets (including trust, trust funds or other trust properties, held, operated or controlled by such local lodge) owned or held by such local lodge at the time of such disbanding, which shall become the property of the International Brotherhood.

The IBB and the Cement Union followed the same practice of demanding the return of all local union assets upon the disbanding of a local union affiliate. (A-7, n.7)

The document that would be executed as the final Merger Agreement was presented to a special convention of the Cement Workers on March 14-15, 1984 called for the purpose of ratifying the proposed Merger. The Merger Agreement was organized to track the provisions of the Boilermakers International Constitution. So, for instance, the creation of a new International Vice President-At-Large was indexed under Article IV

Section 1 of the Boilermakers Constitution, while vacancies in that office were indexed under Article IV Section 5 of the Constitution. (A-10)

The Merger Agreement's first phrase states:

> The Constitution of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers will be the supreme law of the merged organization. (A-9)

Indexed under Article V, Section 3 of the Boilermakers Constitution the Merger Agreement provided:

> Article V, Section 3
> **Jurisdiction of District and Local Lodges**
> Local Union charters held by the current Local Unions in the United Cement, Lime, Gypsum and Allied Workers International Union will have issued in their stead Boilermaker Charters carrying the present local numbers preceded by a capital "D". Each Local Lodge will retain its Local Union treasury.
>
> As soon as possible following effective date of Merger but not to exceed six (6) months, the present districts will be formed into the Cement, Lime, Gypsum and Allied Workers Division. (A-9, 10)

All other assets of the Cement Workers and its district councils of every kind and description were to be turned over to and placed into the General Fund of the International Brotherhood of Boilermakers. (A-10) The Merger Agreement made no mention of, nor did it make changes to, Article V, Section 6 or Article XXXV of the Boilermakers Constitution. Those provisions which dealt with the disbanding of local lodges and the title to the funds and assets of the Boilermakers were left untouched. Post merger the Boilermakers continued to enforce the surrender clauses of their Constitution

where local cement division lodges fell below ten (10) members. (A-7, n.7)

On August 11, 1986 the Boilermakers held their Twenty-Seventh Consolidated Convention. Henry Bechtholdt, Cement Division Director, had become a candidate for International Vice President-At-Large in opposition to the incumbent Richard Northrip. The Merger itself had become an issue at the convention as a result of the Boilermakers' Executive council's resolution to dissolve the Merger; a procedure that was set forth in the Merger Agreement itself. This resolution became the first order of business and was defeated by a vote of the delegates on the floor of the convention. The next order of business was the election of International officers in accordance with Article IV, Section 4 of the Boilermakers' Constitution. The delegates to the Convention elected Henry Bechtholdt to succeed Northrip as the International Vice President-At-Large. In the same election Thomas Cooper, who had decided to abandon his area vice presidency and run for the office of International Secretary-Treasurer, was defeated. (A-6)

Together Cooper and Northrip left the Boilermakers and started a rival International Union, the Independent Workers of North America (IWNA). They were joined by former Boilermaker employees, many of whom had been officers of the now defunct United Cement, Lime, Gypsum and Allied Workers International Union.

In October, 1986, the IWNA met with the officers of Local Lodges D504, D17, D54, D376, D547 and D554 (Local Lodges) and explained to them a procedure developed by the IWNA designed to result in the decertification of the Boilermakers and the certification of the IWNA by these employees. The Boilermaker Constitution expressly prohibits the cessation or disaffiliation of a Local Lodge. (A-10, n.8) It does not, however, prohibit a member or a group of members from leaving the organization. This the members chose not to do. The members of these local lodges were not content to merely

quit, they wanted to transfer the local lodge, as an entity, with its assets in tact, to the IWNA. The procedure set out by the IWNA called for each of the local lodges to conduct an internal union vote to "disaffiliate" from the Boilermakers. Boilermakers International representatives were neither notified of the meetings nor were they invited to attend. The procedure called for the officers of these local lodges to obtain signatures on "disaffiliation" petitions and for an internal union vote on the question of "disaffiliation." The local Lodge members were told that their signatures on new union authorization cards would be used to obtain an election with the NLRB. No Boilermakers representatives were permitted to attend these secret votes and in most cases only small numbers of union members cast their vote in favor of disaffiliation. Although those that attended voted in favor of the disaffiliation, these members were not told that secession or disaffiliation votes were in express violation of the existing Boilermakers Constitution. (A-27) These local lodges were then advised to transfer their assets out of the local lodge and into the bank accounts of a new entity, the IWNA local union. Two of the local lodges, D554 and D547, then made per capita tax payments to the IWNA although the IWNA did not as yet have any constitution or bylaws calling for such payments. These lodges continued to collect dues from their members, but as a result of these manipulations, these local lodges withheld their per capita tax payments to the Boilermakers which the appellants and appellees were able to stipulate came to $39,730.

The District Court found specifically that internal union votes to disaffiliate were ineffective to accomplish that purpose. (A-16, 27) Further, the District Court found, that even after these internal disaffiliation votes were taken, the local lodges and their members continued to accept support services from the IBB. These findings were not disturbed by the Court of Appeals. (A-16, 27)

Between November 4, 1986 and February 9, 1987 the IWNA filed six (6) petitions with the National Labor Relations Board seeking elections for the certification of a new bargaining representative at six employer locations where a Boilermakers' local lodge was the currently certified bargaining representative. (A-7, n.5) Each petition acknowledged that a Boilermakers' local lodge was the currently certified or recognized collective bargaining representative of the employees in question and each was signed by an employee of the IWNA. In each case an election was conducted by the National Labor Relations Board and the Independent Workers of North America was certified as the new bargaining representative of the employees ousting the Boilermakers at those employer locations.

Under the International Brotherhood of Boilermakers' constitution, these NLRB elections effectively reduced the membership of the six local lodges to zero. The Boilermakers' then notified the officers of each of the locals that they were disbanded in accordance with the provisions of Article V, Section 6 of the International Constitution. Although requested to turn over all of the books, records, properties, funds and assets of the local Lodge to the International Union each local failed and refused to do so. (A-7)

REASONS WHY THE WRIT FOR CERTIORARI SHOULD NOT BE GRANTED

1. Certiorari Should Not Be Granted Because The Decision Below Does Not Create A Conflict Among The Circuits.

The decision in the present case is in accord with the Eleventh Circuit decisions in *International Brotherhood of Boilermakers v. Local Lodge D111,* 858 F.2d 1559 (11th Cir. 1988), *cert. denied,* ____ U.S.____, May 1, 1989 and *International Brotherhood of Boilermakers v. Local Lodge D238,* 865 F.2d 1228 (11th Cir.

1989) and is not in conflict with the decision of the Seventh Circuit in *International Brotherhood of Boilermakers v. Local Lodge 714,* 845 F.2d 687 (7th Cir. 1988).

On May 1, 1989, this Court denied a Petition for Writ of Certiorari in *International Brotherhood of Boilermakers, Local Lodge D111, supra.* There the petitioner made the identical claim that they are making herein, i.e. that there is a conflict in the circuits. The case *sub judice* was cited by the petitioner in the D111 case as a basis for its so-called conflict. No additional circuit court decisions, indeed no district court decisions have been decided in the interim that conflict with the present case.

In *International Brotherhood of Boilermakers v. Local Lodge 714, supra,* the IBB sought to enforce the trusteeship provisions of the Boilermakers' Constitution. The IBB argued that local lodge 714 and its officers had violated the Constitution and that the IBB was entitled to injunctive relief to enforce the trusteeship placed on local lodge 714. The Seventh Circuit determined that if there were no longer ten (10) active members in local lodge 714 then the local lodge was automatically disbanded, and thus, there was no local lodge for the IBB to trustee. The Seventh Circuit also stated:

> The international's constitution may forbid disaffiliation, as we have seen. If so, then even if the prohibition is not enforceable by means of the trusteeship, because the prohibition of secession as such may not be a legitimate objective under section 302, it may still be enforceable as a matter of contract law.
>
> * * *
>
> The international union may appear to have a clear right to the return of its books and money, but that is not correct, because if the trusteeship is valid the

> trustee has the right to the books and money, while if the trusteeship is invalid the books and money presumably should be turned over to the international.
>
> * * *
>
> [P]rovided Local Lodge 714 did not disband before the trusteeship was voted and by disbanding perhaps place itself beyond the power of the international to impose a trusteeship; on these questions a remand is necessary.

845 F.2d at 695. Thus, the Seventh Circuit did not resolve two (2) questions: (1) Did Local Lodge 714 fall below ten (10) members and thus automatically disband, and (2) Does the IBB constitution prohibit a local lodge from "disaffiliating"?

In the present case the IBB sought enforcement of the contractual surrender clause set forth in the IBB constitution, referred to by the Seventh Circuit in *International Brotherhood of Boilermakers v. Local Lodge 714,* 845 F.2d 687.[1] The IBB argued that the member-

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1. The constitution of the IBB provides in relevant part:

> Upon issuance of such Charter, such Local Lodge shall, subject to other applicable provisions of this Constitution and particularly Section 3 and 4 of this Article, continue in existence while ten (10) or more of its members are employed under the jurisdiction of the International Brotherhood, subject to the approval of the Executive Council. If ten (10) or more members maintain membership in such Local Lodge and otherwise comply with the provisions of this Constitution, all books, records, properties, funds and assets (including trusts, trust funds, or other trust properties held, operated or controlled by such Local Lodge) owned or held by such Local Lodge shall remain the property of such Local Lodge so long as the Charter is maintained.
>
> Any Local Lodge having less than ten (10) active members shall be automatically disbanded and its Charter returned to the International Brotherhood, together with all books, records, properties, funds and assets (including trusts, trust funds or other trust properties held, operated or controlled by such Local

ship in the Local Lodges fell below ten (10) members as the result of an NLRB election. The IBB further argued that the IBB constitution contractually obligated the Local Lodges to surrender all books, records, property, funds and assets of the local; the locals having been disbanded pursuant to the IBB constitution. Citing the 11th Circuit decision in *International Brotherhood of Boilermakers v. Local Lodge D111,* 858 F.2d 1159, as support, the Third Circuit found this contractual surrender clause enforceable. *International Brotherhood of Boilermakers v. Local Lodge D504,* 866 F.2d 641 (3d Cir. 1989).

Neither the Third Circuit nor the Eleventh Circuit, addressed the issue before the Seventh Circuit – enforceability of a trusteeship. All three (3) circuits are in

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Lodge) owned or held by such Local Lodge at the time of such disbanding, which shall become the property of the International Brotherhood (Article V, Section 6).

The funds and property of a subordinate body are trust funds for the benefit of its members and shall not be divided in any manner among the members of the subordinate body. Upon the surrender, forfeiture or revocation of its charter other than through consolidation, all funds belonging to each subordinate body shall be forwarded promptly to the International Secretary-Treasurer and all real estate and other property owned or held by such body shall be immediately transferred and conveyed by the proper legal instrument to the International Board of Trustees of the International Brotherhood. The International Brotherhood through its Board of Trustees shall be authorized to sell and liquidate such real estate and other property and the proceeds arising therefrom, after the payment of expenses incurred, shall be deposited with the other funds so forwarded to the International Secretary-Treasurer. All such funds shall revert to the General Fund of the International Brotherhood with the proper record of the transfer maintained by the International Secretary-Treasurer. In the event such subordinate body should ever be rechartered at that location, the Executive Council is authorized to give approval to the transfer of an amount not to exceed fifty per cent (50%) of such funds from the General Fund to the credit of the rechartered subordinate body. (Article XXXVI, Section 2).

accord on the only common issue – the enforceability of the surrender clauses contained in the IBB's constitution.

Apparently, Petitioners hinge their argument that there is a conflict among the circuits on certain language in *International Brotherhood of Boilermakers v. Local Lodge 714,* 845 F.2d 687, the Seventh Circuit stated:

> [t]he international constitution is ambiguous on the right to disaffiliate. It contains no provision authorizing disaffiliation and contains a provision making 'secession or threatened secession' a ground for imposing a trusteeship, which could be taken either as an implied prohibition of disaffiliation or as recognition that disaffiliation will sometimes occur and authorization to do something about it.
>
> * * *
>
> Maybe Local Lodge 714 could not disaffiliate but if so many of its members quit and fewer than ten remained the lodge was automatically disbanded and its property reverted to the international.

845 F.2d at 692. The Seventh Circuit went on to conclude that because of the state of the record it could not make a determination as to whether or not the IBB constitution prohibited disaffiliation.

In *International Brotherhood of Boilermakers v. Local Lodge D111, supra,* the Eleventh Circuit did not squarely rule on whether or not the IBB constitution prohibited disaffiliation of a local lodge. The Eleventh Circuit found that Local Lodge D111 fell below ten (10) members and was disbanded as the result of an NLRB election. 858 F.2d 1564. The Eleventh Circuit went on to find the local lodge was contractually obligated to go on making per capita tax payments to the IBB until there were less than ten (10) members. 858 F.2d at 1568,

citing with favor, *International Brotherhood of Boilermakers v. Local Lodge D296,* 687 F.Supp. 469 (D. Ariz. 1988).

In *International Brotherhood of Boilermakers v. Local Lodge D238,* 678 F.Supp. 1575 (M.D. Ga. 1988), *aff'd,* 865 F.2d 1228 (11th Cir. 1989), the Eleventh Circuit more squarely addressed one of the questions left unresolved by the Seventh Circuit in *International Brotherhood of Boilermakers v. Local Lodge 714, supra* whether or not a disaffiliation vote will result in the local lodge having less than ten (10) members, Citing, *International Brotherhood of Boilermakers v. Local Lodge 714,* with apparent favor, the Eleventh Circuit found that the locals in question had not disbanded by taking an internal disaffiliation vote, and that there were in fact more than ten (10) members. There, the Court found:

> The International Union presented evidence that the Local Lodges did not disband, and the Local Lodges failed to provide any evidence or testimony that their memberships fell below ten members.

865 F.2d 1235.

The Third circuit in the case *sub judice* squarely addressed one of the other questions unresolved in *International Brotherhood of Boilermakers v. Local Lodge 714* – whether or not the IBB constitution prohibits disaffiliation. Based on a complete record, the Third Circuit was able to determine that the IBB constitution did in fact prohibit disaffiliation. 866 F.2d 641, 644, n. 8. The Court went on to conclude:

> [t]he Boilermakers, even after the Locals' internal disaffiliation votes, remained the bargaining agent for the Local until the National Labor Relations Board decertification. 866 F.2d at 647.

Although the Seventh Circuit found the Boilermakers' constitution "ambiguous" on the question of disaffiliation, resolution of that issue was not necessary to the court's determination. The District Court in *International Brotherhood of Boilermakers v. Local Lodge D354,* C.No. EV-87-129-C (S.D. Ill., June 6, 1989), however observed that "a careful reading of the *Local 714* opinion leads this Court to the belief that the Seventh Circuit simply was not considering the complexities of this argument at that time" (Slip Op. at p. 7). The District Court then concluded that the decision of the Third Circuit on this issue was correct. In fact, Article XXVIII, Section 2(a) of the constitution provides that a member, in the exercise of his rights under the constitution, may not ". . . evade or avoid his responsibility to the Organization as an institution, or engage in or advocate conduct that would interfere in the organization's performance of its legal or contractual obligations or functions." Article XVII of the Constitution, makes encouraging or engaging in a secessionist movement a chargeable offense. Other chargeable offenses make clear that the duties and loyalty that members owe to this labor union preclude their disaffiliation and transfer of assets to a rival union. Revocation of a local lodge's charter is a potential penalty for this proscribed conduct. Article XVII, Section 5.

Each of the Circuit Court decisions harmonize the Boilermakers' interpretation of its Constitution; none conflict.

II. Certiorari Should Not Be Granted Because The Decision Below Is Based Upon The Distinctive Contractual Arrangement Between The Parties.

The question presented to the Third Circuit was very simple – whether or not the constitution of the IBB is consistent with the merger agreement and requires surrender of Local Lodge assets to the IBB. The Third

Circuit found as a matter of law the contract language in question was not ambiguous. The Third Circuit went on to find that the contract language unambiguously required surrender of Local Lodge assets to the IBB. Such a factual based determination, particular to the parties, does not warrant review on a petition for certiorari. *Goodman v. Lukens Steel Company,* 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987).

Petitioners apparently seek review on a number of more esoteric grounds, raised for the first time in their Petition for Writ of Certiorari. It would not be appropriate to grant certiorari on these issues not raised at the district court or circuit court level. *Springfield v. Kibbe,* 480 U.S. 257, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987); *Mishkin v. New York,* 383 U.S. 502, 86 S. Ct. 958, 16 L.Ed.2d 56 (1966). Nor are the record facts such as to warrant review of the issues now argued by Petitioners in their Petition for Writ of Certiorari. *Gilbert v. California,* 388 U.S. 263, 87 S. Ct. 1951, 18 L.Ed.2d 1178 (1967).

Petitioners raise for the first time in their Petition for Writ of Certiorari that the Third Circuit's decision somehow interferes with the power of employes to select their own collective bargaining representative. In fact, in each case the members of the Local Lodges petitioned the NLRB to select a new bargaining representative. The NLRB, following the requested election, certified the IWNA as these employees' collective bargaining representative. The Petitioners suggest that (1) enforcement of the IBB surrender clause and (2) the obligation to turn over to the IBB dues collected by the local lodge from members prior to the decertification of the boilermakers "creates an improper restraint on members who choose to change affiliation and thus conflicts with the fundamental federal labor policy of consensual unionism." There is absolutely no record evidence before the court below to support such an argument. Moreover, Petitioners did not argue before the court below that

enforcing the IBB constitution would somehow interfere with federal labor policy embodied in 29 U.S.C. §157.

Petitioners raise for the first time in their Petition for Writ of Certiorari the argument that the Labor Management Reporting Disclosure Act does not permit a finding of entitlement to assets. Petitioners did not raise any argument before the court below that enforcement of the IBB constitution would somehow interfere with federal labor policy embodied in 29 U.S.C. §401 or 29 U.S.C. §501.

III. Certiorari Should Not Be Granted Because The Decision Below Comports With Federal Policy.

The IBB constitution unambiguously requires Local Lodges to surrender all books, properties, records, funds and assets to the IBB, *International Brotherhood of Boilermakers v. Local Lodge 714,* 845 F.2d 687; *International Brotherhood of Boilermakers v. Local Lodge D238,* 865 F.2d 1228; *International Brotherhood of Boilermakers v. Local Lodge D461,* 663 F. Supp. 1031 (M.D. Ga. 1987), *aff'd,* 835 F.2d 1439 (11th Cir. 1987); *International Brotherhood of Boilermakers v. Local Lodge D474,* 673 F. Supp. 199 (W.D. Tex. 1987); *International Brotherhood of Boilermakers v. Local Lodge D296,* 687 F. Supp. 469; *International Brotherhood of Boilermakers v. Local Lodge D405,* 699 F. Supp. 749; and *International Brotherhood of Boilermakers v. Godfrey,* CV 87-6-2010-S (N.D. Ala., May 17, 1989). The Third Circuit specifically concluded that this unambiguous language required the instant Local Lodges to surrender all books, properties, funds and assets to the IBB. *International Brotherhood of Boilermakers v. Local Lodge D504,* 866 F.2d 641.

A. Federal Labor Policy Favors Enforcement Of The IBB Constitution.

The surrender language set forth in the IBB Constitution is not unusual, and is in fact, standard language for international unions.[2] The Local Lodges herein contracted with the IBB when it became a chartered local of the Boilermakers. The constitution of the IBB sets forth the terms of that contractual relationship, by which these Local Lodges agreed to abide. One of the terms of that contractual relation was that a Local Lodge is required to surrender all books, property, funds and assets to the IBB if it discontinues that contractual relation. These Local Lodges enjoyed the benefits of that bargain for over two (2) years and then refused to meet their obligations when they wished to end the contractual relation.

There is a specific grant of federal court jurisdiction for unions to enforce such contractual relations. 29 U.S.C. §185; *Plumbers and Pipefitters v. Local 334,* 452 U.S. 615, 101 S. Ct. 2546, 69 L.Ed.2d 280 (1981). Moreover, Congress has specifically recognized the right of labor organizations to govern their own internal affairs, unless there is a direct conflict with federal labor policy. *Plumbers v. Local 334,* 452 U.S. 625-26. Concomitantly, a union's interpretation of the requirements

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2. See, e.g. *BRAC v. Orr,* 95 L.R.R.M. (BNA) 2701 (E.D. Tenn. 1977); *Local 1 v. International Brotherhood of Teamsters,* 461 F. Supp. 961 (E.D. Pa. 1978), *aff'd in part,* 614 F.2d 846 (3d Cir. 1980); *Michigan Teamsters Joint Council v. Bufalino,* 626 F. Supp. 51, (E.D. Mich. 1985); *International Brotherhood of Teamsters v. United States,* 275 F.2d 610 (4th Cir. 1960), *cert. denied,* 362 U.S. 975; *Grain Millers Local v. Grain Millers International,* 59 L.R.R.M. (BNA) 3025 (Neb. D.C. 1965); *International Union v. Local 450,* 271 Minn. 181, 135 N.W.2d 697, 59 L.R.R.M. (BNA) 228 (Minn. 1965); *Pizer v. Brown,* 133 Cal. App.2d 367, 283 P.2d 1055, 36 L.R.R.M. (BNA) 2341 (Cal. Dist. Ct. App. 1955), *cert. denied* 351 U.S. 982; *Fisher v. Behr,* 30 L.R.R.M. (BNA) 2116 (N.Y. Sup. Ct. 1952).

of its own constitution will be respected by the Court and not overturned unless patently unreasonable. *International Brotherhood of Boilermakers v. Hardeman,* 401 U.S. 233, 242-43, 91 S. Ct. 609, 28 L.Ed.2d 10 (1971).

The record evidence is that the IBB has interpreted its constitution to require a local lodge that is disbanded, to surrender all books, property, funds and assets to the IBB. That interpretation of the IBB constitution has been consistently applied since the incorporation of these provisions into the IBB constitution and has continued since the merger between the Cement Union and the IBB.[3] That interpretation of the IBB constitution is not patently unreasonable and, accordingly, is due proper deference by the Court.

Federal labor policy considerations favor enforcement of such a provision.[4] The most fundamental of

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3. *International Brotherhood of Boilermakers v. Local Lodge D504,* 866 F.2d 641, n. 7

4. Contrary to Petitioners' assertion, the vast majority of the courts that have addressed this issue have found similar provisions to serve valid purposes consistent with federal labor policy, and to be thus, enforceable. See generally, *Harker v. McKissock,* 7 N.J. 323, 81 A.2d 480, 28 L.R.R.M. (BNA) 2204 (N.J. 1951); *Walter Kidde v. United Electrical Radio & Machine Workers,* 7 N.J. 528, 82 A.2d 184, 28 L.R.R.M. (BNA) 2241 (N.J. 1951); *Bowman v. Moe,* 66 Wash. 2d 629, 404 P.2d 437, 60 L.R.R.M. (BNA) 2672 (N.Y. Sup. Ct. 1960); *NEA v. Dade County Class Room Teachers Association,* 407 F.Supp. 739 (S.D. Fla. 1974); *aff'd,* 527 F.2d 1388 (5th Cir. 1976); *cert. denied,* 429 U.S. 827; *McVicker v. International Union of District 50,* 327 F.Supp. 296 (N.D. Ohio 1971); *Sawyers v. Grand Lodge, International Association of Machinists,* 279 F.Supp. 747 (E.D. Mo. 1967).

Some Courts have, nevertheless, created a limited exception to this rule where labor organizations have been substantially infiltrated by organized crime or communist influences, resulting in a schism in the International union. See, e.g. *Bradley v. O'Hare,* 202 N.Y. S.2d 141. However, the National Labor Relations Board itself has already ruled no such disruption exists in the International Brotherhood of Boilermakers. See, *Georgia Kaolin, Inc.* 287 N.L.R.B. No. 50 (1987), *cited with favor, International Brother-*

Congressional labor goals is the preservation of industrial stability. *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 77 S. Ct. 912, 1 L.Ed.2d 972 (1957); *United Steelworkers v. Warrior & Gulf Navigation Company* 363 U.S. 574, 80 S. Ct. 1347, 4 L.Ed.2d 1409 (1960). Industrial stability is promoted through collective bargaining between employers and unions, which is in turn part of the federal labor policy. 29 U.S.C. §151; *McVicker v. International Union of District 50 Allied and Technical Workers,* 327 F.Supp. 296. The destruction of labor unions impairs the collective bargaining process and should be avoided if possible. *Electrical Workers v. Foust,* 442 U.S. 42, 99 S. Ct. 2121, 60 L.Ed.2d 698 (1979); *Vaca v. Sipes,* 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967).

If local labor unions are allowed to take the benefits of affiliation with international unions, without being bound by the international constitution, international unions will be unable to protect the limited funds that they can accumulate. International unions could spend large amounts of money organizing and representing employees at a particular location, in the expectation that those employees will become valuable members of the international union as a whole. Allowing local unions to withdraw after they receive these services, despite their contractual obligations, defeats the very purpose of an international labor union – collective action to increase economic power. Enforcement of a constitutional provision that requires the local to surrender its assets upon disaffiliation encourages participation by the local union in the international union. Healthy and stable international unions in turn promote the national labor policy of collective bargaining and industrial stability.

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hood of Boilermakers v. Local Lodge D238, 681 F.Supp. 1570 (M.D. Ga. 1988), *aff'd* 865 F.2d 1228 (11th Cir. 1989).

The Eleventh Circuit recognized that this policy consideration favored enforcement of the IBB constitution. *International Brotherhood of Boilermakers v. Local Lodge D238,* 856 F.2d 1237. As the Seventh Circuit stated:

> [a]n organization might conceivably lack minimum stability if each of its cells were free to depart at a drop of a hat, and if so, it would not comport with the procompetitive policies of Landrum-Griffin to forbid unions to take any measures at all to impede secession.

845 F.2d at 694.

Congress has also found that the preservation of ethical standards in the administration of labor organization is an important federal labor policy. 29 U.S.C. §501(a), which states, *inter alia*:

> It is, therefore, the duty of each person, taking into account the special problems and functions of a labor organization, to hold its money and property *solely for the benefit of the organization* and its members and to manage, invest, and expend the same *in accordance with its constitution and bylaws* and any resolutions of the governing bodies adopted thereunder, *to refrain from dealing with such organization as an adverse party or in behalf of an adverse party*. . . .

(Emphasis added).

The IBB constitution echoes these principles and creates an enforceable contractual obligation very similar to these statutory obligations. Thus, the IBB constitution provides that the funds of a subordinate body are to be used only for the subordinate body in accordance with the IBB constitution and if subordinate body leaves the IBB, the funds must be surrendered to the IBB. IBB constitution Article XXXVI, Section 1 and 2. Likewise,

that IBB constitution provides that no member in exercising his or her rights as a member shall evade or avoid his or her responsibilities to the organization as an institution or advocate any conduct that would interfere with the organization (IBB constitution Article XXIV Section 2), and prohibits a member from advocating conduct detrimental to the interest of the IBB or its subordinate bodies, (IBB constitution Article XVII, Section I(e) and (1). In 29 U.S.C. §411(a)(2) Congress provided:

> That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution. . . .

Contrary to the Petitioners' position, not only do the officers of Local Lodges have duties toward the membership, but they have duties toward the Local Lodge and IBB as entities.[5] These officers must hold the property of the IBB for the benefit of the IBB as an entity. Congress specifically left the manner in which this was to be carried out to the internal operation of unions and their governing rules. Congress also specifically admonished union officers not to deal with the union entity as an adverse party.

As Petitioners note, the IBB constitution provides that local lodge funds are "trust funds for the benefit of its members." Yet, the Petitioners fail to note that the IBB constitution also provides "[t]he funds of any subordinate body shall be used only for the purpose of said body" and "shall not be divided in any manner among

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5. Petitioners boldly state that there is no evidence of a violation of 29 U.S.C. §501. There was ample evidence before the Third Circuit that Local Lodge funds were dissipated in violation of the IBB constitution. Moreover, there was no evidence before the Third Circuit that the Local Lodge Membership somehow approved of this fraud.

the members of the subordinate body." IBB constitution Article XXXVI, Section 1 and 2. Compare the former Cement Union Constitution at page 3, *supra.* The IBB constitution goes on to state that those assets revert to the IBB when the local lodge is no longer a subordinate body of the IBB.

Petitioners appear to advocate that local union officers can spend local union money in any fashion they please, despite contractual restrictions, as long as a majority of the membership votes in favor of the expenditures. In this instance, those members ostensibly voted to spend money in direct contravention to the rules they agreed upon and in conflict with the union entity itself. The logical extreme of this argument is that the local union officers could use local union money to finance a vacation to Bermuda as long as a majority of the membership voted in favor of the expenditure. This is the very type of abuse that 29 U.S.C. §501 was designed to prohibit. The IBB seeks to prevent such abuses in this case by enforcing its contractual rights. By enforcing these contractual rights the court would in turn be promoting federal labor policy as set forth in 29 U.S.C. §501. *International Brotherhood of Boilermakers v. Local Lodge D296,* 687 F.Supp. 469; and *International Brotherhood of Boilermakers v. Local Lodge D111,* 681 F.Supp. at 1575, *aff'd,* 858 F.2d 1559.

B. Enforcement Of The IBB Constitution Does Not Interfere With Employee Rights To Select Their Own Collective Bargaining Representative.

This Court has previously found that the relationship between a union and its members is contractual in nature, unless the contract impinges on some policy of federal labor law. *Scofield v. NLRB,* 394 U.S. 423, 89 S. Ct. 1154, 22 L.Ed.2d 385 (1969); *NLRB v. Boeing Company,* 412 U.S. 67, 93 S. Ct. 1952. 36 L.Ed.2d 752 (1973). Thus, unions remain free to promulgate and

enforce rules against members who voluntarily submit themselves to such enforcement by agreeing to assume full membership, even if the rule and its enforcement might otherwise restrain or coerce the exercise of rights under 29 U.S.C. §157, *Pattern Makers' League v. NLRB,* 473 U.S. 95, 105 St. Ct. 3064, 87 L.Ed.2d 68 (1985); *NLRB v. Allis-Chalmers,* 388 U.S. 175, 87 S. Ct. 2001, 18 L.Ed.2d 1123 (1967).

It is correct that a union member must be free to resign his membership in the union, thereby, escaping any further application of the rule to subsequent conduct. *Pattern Makers' League v. NLRB,* 473 U.S. 95. Nevertheless, *Pattern Makers' League* does not stand for the proposition that a union member who resigns may lay claim to all or a portion of the union treasury. To the contrary, it does not impinge on federal labor law to require a member to pay all contractual financial obligation upon resignation. *NLRB v. Granite State Joint Board,* 409 U.S. 213, 93 S. Ct. 385, 34 L.Ed.2d 422 (1972). Thus, the Court stated in *Granite State Joint Board:*

> We have, therefore, only to apply the law which normally is reflected in our free institutions – right of the individual to join or resign from associations, as he sees fit subject of course to any financial obligations due and owing the group with which he was associated.

409 U.S. at 216.

The IBB has placed no restriction whatsoever on the right of the members of a Local Lodge to resign from union membership. The members of these Local Lodges were free to resign at any time they chose. There is no evidence present in this case to indicate that any members of these Local Lodges resigned from union membership prior to the NLRB election.

The IBB constitution does indicate if enough members resign, so that the local lodge falls below ten (10)

members, that the local lodge forfeits its charter in the IBB. The IBB constitution also states that if the local lodge loses its IBB charter for this or any other reason, that local lodge assets are surrendered to the IBB.

Congress has placed no restriction on an international union's ability to grant or revoke a local union charter. In fact, this Court has specifically recognized the right of international unions to govern their own internal affairs, unless there is a direct conflict with federal law. *NLRB v. Boeing,* 412 U.S. 67, and *Plumbers v. Local 334,* 452 U.S. 615, n. 15.

While there is a specific right for union members to resign from a union, there is no such statutory right for local unions to resign or "disaffiliate" from international unions. In fact, this Court has previously made it very clear that no federal statute regulates union decision making over matters such as affiliation. *NLRB v. Financial Institution Employees, Local 1182,* 475 U.S. 192, 106 S. Ct. 1007, 89 L.Ed.2d 151 (1986); *United Steelworkers v. Sadlowski,* 457 U.S. 102, S. Ct. 2339, 72 L.Ed.2d 707 (1982).

To the extent those internal union affairs are governed by contractual relations, Congress granted jurisdiction to federal courts, under 29 U.S.C. §185, to resolve differences concerning those contractual relations. Since there is no federal labor policy that is affected by a rule preventing local union affiliation, the courts have generally found such a rule contractually enforceable. *NEA v. Dade County ClassRoom Teachers Association,* 407 F.Supp. 739; *McVicker v. International Union of District 50* 327 F.Supp. 296; *Sawyers v. Grand Lodge International Association of Machinists,* 279 F.Supp. 747; *International Brotherhood of Boilermakers v. Local Lodge D474,* 673 F.Supp. 199; *International Brotherhoood of Boilermakers v. Local Lodge D238,* 865 F.2d 1228.

Enforcement of the IBB constitution does not interfere with free employee selection of their collective

bargaining representative, indeed it actually promotes such free choice. The IWNA apparently pilfered the funds of Boilermakers Local Lodges months before the NLRB election. Petitioners assert without resort to record evidence that this was done as the result of some sort of internal union disaffiliation vote.

This internal vote was ineffective to accomplish the purposes of the Petitioners both because it was in derogation of the IBB constitution itself and because these votes were kept secret from the IBB. There was also no evidence that there was any notice to the IBB of the purported vote.[6] There was no evidence that the purported vote authorized the misuse of Local Lodge funds. There was also no evidence before the court below that the members were offered an opportunity to freely discuss the issues and vote in a non-coercive atmosphere. In short, there was no evidence that the minimal due process requirements were observed.

If any party interfered with the election of the collective bargaining representative it was the IWNA. By the time of the NLRB election, the employees were faced with *fait accompli*. The employees had two (2) choices during the NLRB election; (1) vote for the IBB Local Lodge, whose treasury had been pilfered; or (2) vote for the IWNA, which was in possession of the pilfered funds. The pilferage of the IBB books, records, property and funds can only be viewed as an interference with employee freedom of choice. *Kearney & Trecker v. NLRB*, 210 F.2d 852 (7th Cir. 1954), *cert. denied*, 348 U.S. 824.

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6. Although the IBB was generally aware that the IWNA was raiding its locals, the IBB did not become aware of the purported vote at these Local Lodges until discovery took place in the underlying law suit.

C. The IBB Constitution Does Not Require Members To Continue Paying Per Capita Tax After Resignation.

The IBB constitution places no restriction on the right to resign from membership in any Local Lodge. Nor does the IBB's constitution require former members to continuing paying dues after resignation.

The IBB constitution does require a Local Lodge to continue making per capita tax/division fund payments to the IBB, for each member that it does have. The Third Circuit found that the Local Lodges attempt to dissafiliate was ineffectual. See, also, *International Brotherhood of Boilermakers v. Local Lodge D238*, 865 F.2d 1418; *International Brotherhood of Boilermakers v. Local Lodge D354*, C.No. EV-87-129-C (S.D. Ill., June 6, 1989). The Third Circuit went on to find, as did the District Court, that these local lodges collected dues from their members and continued to accept services from IBB international representatives. Thus, the Third Circuit found that the contractual obligation to make per capita tax/division fund payments continued to inure until disbandment.

The amount of per capita taxes collected was stipulated by the parties. Thus, there was no issue before the Third Circuit of requiring individuals who had resigned to pay dues.

The Third Circuit held:

> that the per capita tax is due from Local Lodges for each member until the date of decertification provided the member remained employed and *remained a member of the Local Lodge*. 866 F.2d at 647.

(Emphasis added).

Accordingly, these Local Lodges continued to have a contractual obligation to make per capita tax/division fund payments to the IBB, for each member, until

disbandment. Since a vote to disaffiliate does not constitute resignation, Local Lodges remained obligated to make payments to the IBB until disbandment.

CONCLUSION

For all foregoing reasons, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

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